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# United States Circuit Court of Appeals <sup>1</sup>

FOR THE SECOND CIRCUIT.

MEYER GREENBERG, suing in behalf of himself and other employees and former employees of defendants similarly situated,

Plaintiff-Appellee-Appellant,  
against

Civil No.  
19-86

ARSENAL BUILDING CORPORATION, and  
SPEAR & Co., Inc.,  
Defendants-Appellants-Appellees.

2

## Statement Under Rule XIII, Subdivision 4.

This action was commenced in the United States District Court for the Southern District of New York by the service of a summons and complaint on August 13, 1942. The amended complaint was served on September 11, 1942. Defendants' answer was served on September 28, 1942. The amended complaint and answer were amended by stipulation dated October 30, 1942. Plaintiff's reply was served on November 19, 1942.

The defendants have not been arrested, nor was bail taken or property attached or arrested.

By stipulation dated February 8, 1943, the action was discontinued as against Arsenal Annex Corporation.

The action was tried before Judge Henry W. Goddard on February 8, 9, 10, 11, 15, 16, 17, 18 and 19, 1943. No question was referred to a Commissioner or Commissioners, Master or Referee.

3

*Statement Under Rule XIII, Subdivision 4*

Judgment was entered on October 26, 1943, in favor of the plaintiff and the following employees on whose behalf plaintiff sued: George W. Silvera, Harry B. Simon, Santiago Balara, Jerry Suarez, Phillip Haberman, Julio Roque Del Valle, Michael Cassar, Joseph A. Costa, John Cassar, Jose Garcia, Anthony Cali Lo Spesa, Harry Blum, Clarence Bryant, Eli Davis, Jose Martinez, Jose L. Garcia, Arthur Lipsman, August Gangi, Charles Anderson, V. James Catone, Manuel Longeira, Manuel Veiga, Raymond Ramo, Julius Falcheck and Andrew Martinez.

5 By notice of motion dated December 24, 1943, the plaintiff moved to correct the judgment entered on October 26, 1943, to add thereto the sum of \$2,151.80 interest and \$60 as a disbursement for the attendance of the official stenographer at the trial. An order was made and entered in the office of the Clerk of the Southern District on February 5, 1944, granting the motion to add the \$2,151.80 as interest to the judgment and amending the judgment nunc pro tunc as of October 26, 1943, and denying the motion to add \$60 as a disbursement.

By notice of appeal dated November 4, 1943, the defendants appeal from the judgment entered.

6 By notice of appeal dated November 18, 1943, the plaintiff appeals from that portion of the judgment which awarded plaintiff an attorney's fee in the sum of \$750 as insufficient.

The plaintiff appeared originally by Victor J. Herwitz, as his attorney. By stipulation dated February 28, 1944, Aaron Benenson was substituted and now appears as plaintiff's attorney. The defendants are represented by McLanahan, Merritt, Ingraham & Christy and Kenneth C. Newman.

There has been no change of parties or attorneys since the commencement of the within action, except as set forth above.



## Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEYER GREENBERG, suing in behalf of himself and other employees and former employees of defendants similarly situated,

Plaintiff,

v.

ARSENAL BUILDING CORPORATION, and  
SPEAR & Co., Inc.,  
Defendants.

Civil Action  
File No.  
19-86

To the above named Defendants:

You are hereby summoned and required to serve upon VICTOR J. HERWITZ, Esq., plaintiff's attorney, whose address is 521 Fifth Avenue, Borough of Manhattan, City of New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: Aug 13, 1942

GEORGE J. H. FOLLMER

Clerk of Court.

[Seal of the Court.]

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**Amended Complaint.**

IN THE

**DISTRICT COURT OF THE UNITED STATES,****FOR THE SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE.]

I.

11

Plaintiff brings this action for and in behalf of himself and in behalf of other employees and former employees of defendants similarly situated, to recover unpaid overtime compensation and an additional equal amount as liquated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

II.

12

Jurisdiction is conferred upon this court by Section 41 (8), 28 U.S.C.A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16 (b) of the Act. The Act has been in effect since October 24, 1938.

III.

At all times herein mentioned defendants have been corporations organized under and existing by virtue of the laws of the State of New York, having their principal places of business at 463 Seventh Avenue and 225 Fifth Avenue, in the City, County and State of New York, within the jurisdiction of this Court.

*Amended Complaint*

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## IV.

At all times herein mentioned defendant Arsenal Building Corporation has been the owner of and in control of a twenty-two (22) story and basement loft building located at 463 Seventh Avenue, New York, N. Y., known as the Arsenal Building.

## V.

At all times herein mentioned defendant Spear & Co. Inc. has acted as the agent of and for the account of the other defendants in the management and operation of the building, has had authority to hire and fire employees engaged in the operation and maintenance of the building, and has issued instructions to and otherwise controlled, directed and supervised the employees in the performance of their duties; in so doing defendant Spear & Co. Inc. has acted at all times in the interest of the other defendants in relation to such employees.

14

## VI.

At all times herein mentioned space in the Arsenal Building has been leased by defendants to and occupied by approximately fifty (50) tenants, of which approximately forty (40), have been engaged in the building in the production, sale and distribution of ladies' garments, and approximately five (5) have been engaged in the building in the purchase, sale and distribution of silks, rayons and other materials and supplies at wholesale to manufacturers, wholesalers and contractors in the ladies' garment industry.

15

## VII.

At all times herein mentioned substantially all of the materials from which goods have been produced in the building by tenants engaged in the production, sale and distribution of ladies' garments have been purchased, transported and received in interstate commerce from points in various states other than the State of New York, and substantially all of the goods produced by such tenants have been produced for interstate commerce and have been, subsequent to the work performed upon them in the building, sold, shipped, transported, distributed and delivered in interstate commerce from the building to points in various states other than the State of New York. At all times herein mentioned substantial quantities of silks, rayons and other materials and supplies distributed in the building by tenants engaged in the sale and distribution at wholesale of such materials have been purchased, transported and received in interstate commerce from points in various states other than the State of New York, and substantial quantities of such goods have been sold, shipped, transported, distributed and delivered in interstate commerce in and from the building to points in various states other than the State of New York. With few exceptions, substantially all of the tenants in the building have thus been regularly and continuously engaged there in trade, commerce and transportation between the several states of the United States and in the production of goods for distribution among the several states of the United States.

## VIII.

At all times herein mentioned a substantial number of tenants in the building have been regularly and continuously engaged there in the use of the mails, telephone, telegraph and other instrumentalities of interstate com-

*Amended Complaint*

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merce to communicate between offices in the building and various points outside of the State of New York. A substantial number of tenants have thus regularly and continuously engaged in the building in interstate transmission and communication.

## IX.

Since October 24, 1938 defendants have employed a total of approximately thirty (30) employees, and an average of approximately twenty-five (25) employees, including plaintiff, as building maintenance and operating employees, in such capacities as elevator operators, starters, watchmen, engineers, firemen, mechanics, electricians, porters and handymen, in the maintenance and operation of the Arsenal Building and of the facilities within the building. These employees have at all times performed the customary duties of persons charged with effective maintenance of a loft and manufacturing building, including the furnishing of heat and hot water; the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as raw materials and other goods coming to and finished garments and other products going from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; and the keeping of the building and tenants' quarters in a clean and habitable condition.

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## X.

In performing their duties the said employees, including plaintiff, have been engaged in operations closely, imme-

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*Amended Complaint*

diately and essentially related to interstate trade, commerce, transportation, transmission and communication carried on in the building by the various tenants, and in occupations and processes necessary to the preparation, handling and production for interstate commerce of various goods, articles and materials and commodities by the tenants in the building.

## XI.

23

Between October 24, 1938 and the present date defendants employed plaintiff, Meyer Greenberg, as an elevator operator engaged in interstate commerce and in the production of goods for interstate commerce, and during the period between October 24, 1938 and the present date defendants have employed various other building maintenance and operating employees similarly situated to plaintiff in interstate commerce and in the production of goods for interstate commerce, for work-weeks longer than the applicable maximum number of weeks prevailing under Section 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939; 42 hours per week between October 24, 1939 and October 24, 1940; and

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40 hours per week subsequent to October 24, 1940) and defendants have failed and refused to compensate plaintiff and such other employees for such employment in excess of the applicable maximum in such workweeks at rates not less than one and one-half times the regular rates at which they have been employed. The employment of the plaintiff and other employees similarly situated for workweeks in excess of the applicable maximum prevailing under Section 7 of the Act without compensating them for such excess at rates not less than one and one-half times the regular rates at which they have been employed was in violation of Section 7 of the Act.



*Amended Complaint*

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## XII.

During the period from October 24, 1938 to February 5, 1942, defendants employed Meyer Greenberg for the number of hours in each week, and for the number of overtime hours in excess of the maximum standard prevailing under Section 7 of the Act, shown in Schedule "A" annexed hereto; and during the same period defendants paid Meyer Greenberg in each week the wages shown in Schedule "A" and compensated him at the hourly rate of pay there shown; accordingly Meyer Greenberg was underpaid in an amount as shown for each week in Schedule "A," or in the total sum of \$230.11 for the entire period.

26

WHEREFORE plaintiff Meyer Greenberg prays that judgment be awarded him in the sum of \$230.11 for unpaid overtime compensation, and for an additional equal amount as liquidated damages, or a total of \$460.22; and plaintiff further prays that judgment be awarded in favor of all other employees similarly situated in amounts equal to the difference between the amounts such employees have respectfully received and the amounts such employees should respectively have received if they had been compensated in accordance with the requirements of Section 7 of the Act, together with an equal additional amount, or a total of approximately \$15,000; and plaintiff further prays that the court allow the costs of this action together with a reasonable attorney's fee to be paid by defendants in accordance with Section 16 (b) of the Act.

27

VICTOR J. HERWITZ

Attorney for Plaintiff.

521 Fifth Avenue,

New York, N. Y.

23

## Answer.

## DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendants, ARSENAL BUILDING CORPORATION and SPEAR & Co., Inc., answering plaintiff's amended complaint herein:

29 1. Deny each and every allegation contained in paragraph IV of the complaint, except defendants admit that Arsenal Building Corporation owned the building located at 463 Seventh Avenue, New York City, hereinafter sometimes referred to as the Arsenal Building, during the period mentioned in the complaint.

2. Deny each and every allegation contained in paragraph V of the complaint, except defendants admit that Spear & Co., Inc. managed said building as agent for Arsenal Building Corporation.

30 3. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, VI, VII and VIII.

4. Deny each and every allegation contained in paragraph IX of the complaint, except defendants admit that Arsenal Building Corporation employed plaintiff and others as building service employees in the Arsenal Building.

5. Deny each and every allegation contained in paragraph X of the complaint except defendants admit that plaintiff was employed by defendant Arsenal Building Corporation in an occupation necessary to the production of goods for interstate commerce.

6. Deny each and every allegation contained in paragraphs XI and XII of the complaint, except defendants



*Answer*

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admit that Arsenal Building Corporation employed plaintiff and others on the terms and conditions and for the periods hereinafter specifically set forth and admitted.

FOR ITS DEFENSES, DEFENDANTS ALLEGE:

FIRST AND PARTIAL DEFENSE

7. That the amended complaint fails to state a claim against defendants upon which relief can be granted in behalf of any persons other than the plaintiff, Meyer Greenberg, and that it fails to state a claim or claims in behalf of any employees similarly situated to said plaintiff within the purview of Section 16 (b) of the Act.

32

WHEREFORE, defendants pray that all references to other employees of the defendants be stricken from the complaint.

SECOND AND COMPLETE DEFENSE

8. That throughout the entire period of time covered by the complaint, when defendant, Arsenal Building Corporation, hereinafter sometimes referred to as the Employer, employed plaintiff and other employees in the Arsenal Building, the said defendant, as owner, was a party to certain master collective bargaining agreements between The Midtown Realty Owners Association, Inc., The Penn Zone Association, Inc. and the Greater New York Council of the Building Service Employees International Union governing the terms and conditions of employment in said building, to wit, the so-called Extended Mahoney Agreement, dated February 19, 1936, as amended by the so-called Alger Agreement, dated May 21, 1937, and the arbitration award made thereunder and thereby part of said agreement, known as the Alger Award, effective February 1, 1938; and the so-called Me-

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*Answer*

Grady Agreement between the said Midtown Realty Owners Association, Inc. and the Penn Zone Association, Inc., and Locals 32-B, 164 and 32-J of the Building Service Employees International Unions, effective February 4, 1939 (Exhibit "A" annexed to and made a part of this answer), together with the so-called Wolff Award, effective August 4, 1940, made a part of said latter agreement.

35

9. That throughout the period set forth in plaintiff's complaint, the defendant, Arsenal Building Corporation, and its employees, including the plaintiff, were mutually bound by all the provisions of said collective bargaining agreements by virtue of the membership of its employees in Local 32-B of said Union, or by their individual acceptances of said agreements and by the continuance of defendant, Arsenal Building Corporation, as a party to said collective agreements.

36

10. That said collective bargaining agreements were entered into and carried out by the parties in harmony with the spirit and purpose of the State and National Labor Relations Acts and were intended by the defendant, Arsenal Building Corporation, and its employees, to constitute a complete agreement upon the terms and conditions of their employment relationship and to bring such relationship into conformity with all applicable State and National Laws.

11. That it was mutually agreed that the regular or standard hours of employment of the Arsenal Building employees would be limited to a specified maximum per week, and that said employees would be paid therefor a specified regular weekly wage and that all hours in excess of such standard workweek would be paid for at the rate of time and one-half; the agreed standard workweek and the actual workweek and weekly wages of the

plaintiff being as follows for the specified periods of his employment;

October 24, 1938 to February 2, 1939— \$27.75  
per week for a 48-hour week

February 3, 1939 to August 1, 1940— \$28.75  
per week for a 47-hour week

August 2, 1940 to February 5, 1942— \$29.33  
per week for a 46-hour week

12. That throughout the period of their employment, plaintiff and the other employees of Arsenal Building Corporation have been paid in full and in strict accordance with said collective bargaining agreements.

13. That by this action plaintiff claims that in addition to the wages paid him and the other employees under said collective bargaining agreements Arsenal Building Corporation was and now is required to pay all its employees half time for all hours worked each week in excess of the maximum stipulated in Section 7(a) of the Fair Labor Standards Act of 1938 (hereinafter called "the Act") based upon an hourly rate computed by dividing the regular weekly wage in each case by the hours worked each week, and plaintiff also claims there should be added to this sum calculated as above set forth, a like sum as so-called "liquidated damages" under Section 16(b) of the Act, together with a reasonable attorney's fee to be fixed by the Court.

14. That at no time prior to June 1, 1942, did plaintiff or any other employee of the defendant Arsenal Building Corporation ever make any claim for additional wages under the Act.

15. That at the end of each pay period during their employment all the Arsenal Building employees individually signed receipts acknowledging payment in full for all hours worked during such pay period.

## Answer

40 16. That in full and complete reliance upon the acceptance by its employees of said collective bargaining agreements and upon the failure of its employees to make any claim for additional wages under the Act, defendant Arsenal Building Corporation, from time to time, calculated its probable labor and other costs to be incurred in the operation and maintenance of the Arsenal Building and upon the basis of such costs and estimates determined the lease rentals, which it charged the tenants of said building in order to meet the cost of such operation and maintenance.

41 17. That before the assertion of a claim by any of its employees under the Act, and acting in full reliance on the course of conduct of its employees, the employer substantially and irrevocably changed its position in that it is now unable retroactively to adjust its lease rentals and costs in the operation and maintenance of the Arsenal Building to meet the claims of this plaintiff or of its other employees for back wages and as a result the employer would suffer undue hardship and gross inequity if plaintiff were permitted to prevail in this action.

42 18. That by virtue of the foregoing facts and circumstances, plaintiff is and should be estopped from prosecuting the claims set forth in the complaint herein.

## THIRD AND COMPLETE DEFENSE AND ALSO AS A COUNTERCLAIM

19. Defendants here repeat all the allegations contained in paragraphs numbered "8" to "17" inclusive hereof.

20. That said collective bargaining agreements were entered into and carried out according to their terms by the employer and its employees during the period covered by the complaint in the mutual and bona fide belief that neither the plaintiff nor any of the said employees were engaged in commerce or in the production

of goods for commerce within the meaning of the Act and that therefore the Act had no application to their employment relationship.

21. That it now appears as a result of the decision of the Supreme Court of the United States in the case of *Kirschbaum v. Walling*, decided June 1, 1942, that in entering into and carrying out said collective bargaining agreements according to their terms, the employer and its employees acted under a mutual mistake of fact and law as to the non-application of the Act to their employment relationship.

44

22. That the true intention of the employer and its employees in entering into and carrying out said collective bargaining agreements was that such agreements should be in complete conformity with all laws applicable to their employment relationship and that the employees should not be paid more than the stipulated weekly wages for their standard workweek, as above set forth and alleged; that plaintiff's belated claims for additional wages are contrary to the true intention of the parties as evidenced by their collective agreements and under all the circumstances of this case are grossly inequitable and unconscionable; that but for said mutual mistake of fact and law as to the application of the Act to their employment relationship, the employer and its employees in said collective bargaining agreements would have provided for and agreed upon such regular hourly rates or a formula for determining such hourly rates as, on the basis of straight time for hours worked each week plus half-time for hours worked in excess of those stipulated in Section 7(a) of the Act, would have yielded weekly wages equal to but not exceeding those agreed to be paid under said collective bargaining agreements.

45

WHEREFORE, defendants respectfully pray that in accordance with the true intention of the parties and with good conscience and equity the Court reform said col-



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## Answer

• collective bargaining agreements between Arsenal Building Corporation, plaintiff, and its other employees by including therein specific regular hourly rates or a formula for determining such rates so that the total weekly compensation found to be due its employees for the period of their employment, including compensation for overtime hours in accordance with Section 7(a) of the Act, shall equal but not exceed the total weekly compensation agreed to be paid and actually paid its employees under said collective agreements.

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## FOURTH AND COMPLETE DEFENSE

23. Defendants here repeat all the allegations contained in paragraphs numbered "8" to "12" inclusive hereof.

24. That no regular hourly rate was ever expressly provided in said collective bargaining agreements between the Arsenal Building Corporation and its employees.

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25. That consistent with the true intention of the parties that said collective bargaining agreements should be in complete conformity with law and that the employees should receive the specified regular weekly wage for a regular or standard workweek as above set forth, the regular hourly rates impliedly agreed upon between the employer and its employees were such rates as on the basis of straight time for hours worked each week plus half time for hours worked in excess of those stipulated in Section 7 (a) of the Act, would yield weekly wages equal to but not exceeding those agreed to be paid, and actually paid, under said collective bargaining agreements, to wit, in this case as follows:

October 24, 1938 to February 2, 1939—\$.555 per hour  
 February 2, 1939 to October 23, 1939—\$.592 per hour  
 October 24, 1939 to August 1, 1940—\$.58 per hour  
 August 2, 1940 to October 23, 1940—\$.611 per hour  
 October 24, 1940 to February 5, 1942—\$.598 per hour

26. That plaintiff and the other Arsenal Building employees have been paid in full under the Act.

#### FIFTH AND COMPLETE DEFENSE

27. Defendants here repeat all the allegations contained in paragraphs numbered "8" to "12" inclusive hereof.

28. That said collective bargaining agreements provide, in part, as follows:

"In the event of any dispute between the parties hereto with reference to any matter not provided for in this agreement, or in reference to the terms, interpretation and application of this agreement, the same shall be referred to a Board of Arbitration, which shall consist of three (3) members, the first designated by the "Employer," the second by the "Union," and the third, who shall be the Impartial Chairman, shall be Burton A. Zorn. Decisions thereon shall be final and binding upon the parties hereto. Expenses of such arbitration shall be borne equally by the parties hereto."

29. That it was not intended by said collective bargaining agreements that the plaintiff or the other Arsenal Building employees would receive more than the weekly wages provided for therein.

30. That the claim made by the plaintiff in this action constitutes an arbitrable dispute under said collective bargaining agreements, and defendant Arsenal Building Corporation invokes its right under said agreements to refer this claim to the Board of Arbitration established thereunder and asserts that by its answer herein it does not waive or intend to waive such right.

WHEREFORE, defendants respectfully pray that all proceedings by plaintiff in this action be stayed and enjoined

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**Answer**

pending the determination of the said Board of Arbitration under said collective agreements.

**SIXTH AND PARTIAL DEFENSE**

31. Defendants here repeat all the allegations contained in paragraphs numbered "14" to "17" inclusive hereof.

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32. That the course of conduct of plaintiff and the other employees of Arsenal Building as set forth in paragraphs numbered "14" to "17" hereof, was calculated to increase the damages, interest and costs, which might be recoverable by plaintiff in an action such as the instant action, contrary to plaintiff's legal obligation to mitigate damages; and that defendants were afforded no notice of plaintiff's claims or opportunity to meet such claims at such times and under such circumstances as would have enabled defendants to avoid or minimize the damages now claimed by plaintiff.

WHEREFORE, plaintiff is and should be estopped from asserting any claim or claims for liquidated damages or an attorney's fee, as set forth in the complaint herein.

54

**SEVENTH AND PARTIAL DEFENSE**

33. That until the decision of the Supreme Court of the United States in *Kirschbaum v. Walling*, decided June 1, 1942, there was no decision of the Supreme Court of the United States holding that persons employed in the same or similar capacities and relationships as the employees of defendant Arsenal Building are employees engaged in commerce or in the production of goods for commerce; that the weight of judicial authority on the question and issue involved in *Kirschbaum v. Walling*, and in this case was clearly contrary to and against the application of the Act in such situation; that the learned Circuit Court of this District stated in its opinion in the



case of *Fleming v. Arsenal Building Corporation* (which involved the application of the Act to the very employees involved in this action), decided by that Court December 30, 1941, that "obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling"; and that under all these circumstances the application of the Act to the employment relationship between Arsenal Building and its employees herein was most doubtful and obscure.

34. That if this Court finds that defendant Arsenal Building Corporation has failed to comply with the Act in this case, then such failure on the part of said defendant was wholly unintentional and without bad faith.

35. That with reasonable promptness after the decision of the United States Supreme Court in *Kirschbaum v. Walling*, decided June 1, 1942, defendant, Arsenal Building Corporation, without prejudice to its position as set forth in this answer and for the sole purpose of effecting an amicable settlement of the claim of the plaintiff and its other employees, offered to pay any overtime due under the Act for hours worked in excess of those stipulated under Section 7 (a) of the Act, computed on the basis set forth in plaintiff's amended complaint, but without the addition of liquidated damages and an attorney's fee under Section 16 (b) of the Act, and that the attorney for the plaintiff herein refused said offer.

36. That by virtue of the foregoing facts and circumstances, defendants are not liable to plaintiff for liquidated damages and an attorney's fee under Section 16 (b) of the Act.

#### EIGHTH AND PARTIAL DEFENSE

37. If it is held that plaintiff is entitled to recover liquidated damages and an attorney's fee under Section

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*Answer*

16 (b) of the Act, then such application of the Act or said Section thereof would be and is unconstitutional under the Fifth Amendment to the Constitution of the United States, in that it would deprive the defendants of their property without due process of law.

WHEREFORE, defendants pray that plaintiff's complaint herein be dismissed, with costs.

McLANAHAN, MERRITT, INGRAHAM & CHRISTY

By Robert R. Bruce,

Member of firm

59

KENNETH C. NEWMAN

Attorneys for Defendant

Office and Post Office Address

• No. 40 Wall Street

Borough of Manhattan

City of New York

*Exhibit "A" Annexed to Answer.*

(In evidence as Plaintiff's Exhibit 3.)

60

(Omitted pursuant to stipulation and copies to be produced upon the argument of the appeal.)

**Stipulation Amending Complaint and Answer.**

61

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties in the above entitled action as follows:

1. That paragraph I of the Amended Complaint filed in the action be deemed amended to read as follows:

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## I.

Plaintiff brings this action for and in behalf of himself and in behalf of other employees and former employees of defendants similarly situated, to recover unpaid overtime compensation and an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act. Plaintiff has been authorized by the following present and former employees of defendants who are similarly situated to plaintiff to institute this action in their behalf: George W. Silvera, Harry B. Simon, Santiago Balara, Jerry Suarez, Phillip Haberman, Julio Roque Del Valle, Michael Cassar, Joseph A. Costa, John Cassar, Jose Garcia, Anthony Cali Lo Spesa, Harry Blum, Clarence Bryant, Eli Davis, Jose Martinez, Jose L. Garcia, Arthur Lipsman, August Gangi, Charles Anderson, V. James Catone, Manuel Longueira, Manuel Veiga, Raymond Ramo, Julius Falcheck and Andrew Martinez. The Amended Complaint as thus amended shall be known as the "Second Amended Complaint" in this action.

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64 *Stipulation Amending Complaint and Answer*

2. That paragraphs "33" to "35" inclusive of defendants' answer be renumbered as paragraphs "34" to "36" and that a new paragraph "33" be added to said answer to read as follows:

33. Defendants here repeat all the allegations contained in paragraphs numbered "8" to "12" inclusive, "14" to "17" inclusive and "20" to "22" inclusive hereof.

65 3. That defendants' answer as thus amended shall be deemed defendants' answer to plaintiff's Second Amended Complaint and that the time of plaintiff to reply to any cross-claim or counterclaim contained in said answer is hereby extended until November 19, 1942.

Dated: New York, N. Y., October 30, 1942.

VICTOR J. HERWITZ

Attorney for Plaintiff

McLANAHAN, MERRITT, INGRAHAM & CHRISTY

& KENNETH C. NEWMAN

Attorneys for Defendants

**Reply.**

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**IN THE****DISTRICT COURT OF THE UNITED STATES,****FOR THE SOUTHERN DISTRICT OF NEW YORK.****[SAME TITLE.]**

Plaintiff, replying to the COUNTERCLAIM alleged in the THIRD AND COMPLETE DEFENSE in defendants' answer to plaintiff's second amended complaint herein, alleges as follows:

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1. States that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "19" of the answer, except that plaintiff admits that during the period of time covered by the complaint defendant Arsenal Building Corporation was a party to certain collective bargaining agreements between The Midtown Realty Owners Association, Inc., the Penn Zone Association, Inc. and the Greater New York Council of the Building Service Employees International Union and Locals 32-B, 164 and 32-J of the Building Service Employees International Union, and except that plaintiff denies defendants' allegation that at no time prior to June 1, 1942 did plaintiff or any other employee of defendant Arsenal Building Corporation ever make a claim for additional wages under the Fair Labor Standards Act of 1938, and except that plaintiff denies that the allegations in paragraph "11" of the answer fairly and completely set forth the substance and nature of plaintiff's claim in this action and plaintiff begs leave to refer to the complaint in full and, in connection with such reference, admits that the nature and substance of plaintiff's claim is fairly and completely set forth therein.

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*Reply*

2. Denies each and every allegation contained in paragraphs "20," "21" and "22" of the answer.

FOR A FIRST AND COMPLETE REPLY TO THE ALLEGED COUNTERCLAIM SET FORTH IN DEFENDANTS' THIRD AND COMPLETE DEFENSE:

3. The alleged counterclaim fails to state a claim against plaintiff upon which relief can be had in this action.

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FOR A SECOND AND COMPLETE REPLY TO THE ALLEGED COUNTERCLAIM SET FORTH IN DEFENDANTS' THIRD AND COMPLETE DEFENSE:

4. This Court lacks jurisdiction over the subject matter of the alleged counterclaim.

FOR A THIRD AND COMPLETE REPLY TO THE ALLEGED COUNTERCLAIM SET FORTH IN DEFENDANTS' THIRD AND COMPLETE DEFENSE:

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5. For at least two years prior to the filing of the complaint in this action defendants had full knowledge of the fact that the Administrator of the Wage and Hour Division of the United States Department of Labor and his representatives had expressed to defendants the opinion that their employees were subject to and entitled to the benefit of the Fair Labor Standards Act of 1937 and that the Administrator and his representatives were prepared to proceed to enforce the Act as against defendants because of defendants' refusal to comply with its provisions in the payment of wages to employees.

6. All of the pertinent provisions of the collective bargaining agreements referred to in paragraphs "1" through "17" of defendants' answer, as incorporated



*Findings of Fact and Conclusions of Law*

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by reference in the alleged counterclaim, had been fully and completely executed upon the part of all of the parties for at least six months at the time of the filing of the complaint in this action.

7. Defendants have unreasonably delayed in seeking the relief sought in the alleged counterclaim and are barred by their own laches and delay from obtaining that relief in a court of equity.

WHEREFORE plaintiff prays that defendants' THIRD AND COMPLETE DEFENSE herein should be dismissed, with costs.

VICTOR J. HERWITZ,  
Attorney for Plaintiff,  
521 Fifth Avenue,  
New York, N. Y.

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*Findings of Fact and Conclusions of Law.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

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This action having been tried by the court without a jury, the court hereby makes the following findings of fact and conclusions of law:

*Findings of Fact*

1. Defendants Arsenal Building Corporation and Spear & Co. Inc. are corporations organized under and existing by virtue of the laws of the State of New York, having principal places of business at 463 Seventh Ave-

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*Findings of Fact and Conclusions of Law*

nue and 225 Fifth Avenue, New York, N. Y., respectively.

2. During the period covered by the complaint, defendant Arsenal Building Corporation was the owner of a 22-story and basement loft building located at 463 Seventh Avenue, New York, N. Y., known as the Arsenal Building (referred to hereafter as "the building").

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3. During the period covered by the complaint, defendant Spear & Co. Inc. acted as the agent of and for the account of defendant Arsenal Building Corporation in the management and operation of the building, had authority to hire and fire employees engaged in the operation and maintenance of the building, issued instructions to and controlled, directed and supervised the employees in the performance of their duties and otherwise acted in the interest of defendant Arsenal Building Corporation in relation to such employees.

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4. During the period in question defendant Spear & Co. Inc. performed many of the services customarily performed by an owner managing his own building; and defendant Spear & Co. Inc. had a branch office in the Arsenal Building and was not only the rental agent for it but hired the personnel of the building, paid them their wages, for which they were reimbursed by the owner, directed and supervised them in the performance of their duties.

5. During the period covered by the complaint plaintiff Meyer Greenberg was employed by defendants as an elevator operator in the Arsenal Building.

6. Plaintiff Meyer Greenberg was at all times engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

7. Plaintiff Meyer Greenberg instituted and prosecuted this action in his own behalf and as representative in



*Findings of Fact and Conclusions of Law*

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behalf of the following present and former employees of the defendants similarly situated, each of whom specifically authorized plaintiff to so proceed by a written power of attorney duly executed and acknowledged: George W. Silvera, Harry B. Simon, Santiago Balara, Jerry Suarez, Phillip Haberman, Julio Roque Del Valle, Michael Cassar, Joseph A. Costa, John Cassar, Jose Garcia, Anthony Cali Lo Spesa, Harry Blum, Clarence Bryant, Eli Davis, Jose Martinez, Jose L. Garcia, Arthur Lipsman, August Gangi, Charles Anderson, V. James Catone, Manuel Longueira, Manuel Veiga, Raymond Ramo, Julius Falcheck and Andrew Martinez.

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8. Plaintiff Meyer Greenberg was employed by defendants and actually worked during the following periods on the following basis:

October 24, 1938 to February 2, 1939—	\$27.75
per week for a 48-hour week	
February 3, 1939 to August 1, 1940—	\$28.75
per week for a 47-hour week	
August 2, 1940 to February 5, 1942—	\$29.33
per week for a 46-hour week	

9. During the period covered by the complaint defendants failed to pay to plaintiff Meyer Greenberg and the other employees similarly situated overtime compensation at the rates provided for by Section 7 of the Fair Labor Standards Act of 1938.

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10. Plaintiff Meyer Greenberg and the other employees similarly situated whom he was authorized to represent were underpaid, respectively, in the following amounts; and plaintiff is entitled to recover in his own behalf and as representative in behalf of each of the other employees enumerated the following amounts, respectively, as unpaid overtime compensation, together with an equal additional amount in each case as liquidated damages (exclusive of attorneys' fees and costs, and less deduc-

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*Findings of Fact and Conclusions of Law*

tions for Social Security Tax and the Victory Tax, if such deductions are required by law).

	Unpaid Overtime	Liquidated Damages	Total
Meyer Greenberg	\$184.00	\$184.00	\$368.00
George W. Silvera	210.84	210.84	\$421.68
Harry B. Simon	208.45	208.45	\$416.90
Santiago Balara	35.10	35.10	70.20
Jerry Suarez	35.98	35.98	71.96
83 Phillip Habefman	178.49	178.49	356.98
Julio Roque Del Valle	183.23	183.23	366.46
Michael Cassar	200.34	200.34	400.68
Joseph A. Costa	195.50	195.50	391.00
John Cassar	174.86	174.86	349.72
Jose Garcia	197.79	197.79	395.58
Anthony Cali Lo Spesa	94.36	94.36	188.72
Harry Blum	193.69	193.69	387.38
Clarence Bryant	205.46	205.46	410.92
Eli Davis	227.52	227.52	455.04
Jose Martinez	219.80	219.80	439.60
Jose L. Garcia	165.80	165.80	331.60
Arthur Lipsman	201.78	201.78	402.56
84 August Gangi	164.96	164.96	329.92
Charles Anderson	234.32	234.32	468.64
V. James Catone	207.42	207.42	414.84
Mannel Longueira	655.55	655.55	1,311.10
Mannel Veiga	179.93	179.93	359.86
Raymond Ramo	659.30	659.30	1,318.60
Julius Falcheck	71.74	71.74	143.48
Andrew Martinez	93.87	93.87	187.74
			<hr/> \$10,759.16

11. The case was well prepared, tried and briefed by both counsel and the trial occupied some eight court days and presented defenses that were novel. But in view of

*Findings of Fact and Conclusions of Law*

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the fact that there was neither bad faith nor wilful violation of the Act, and that the amount which the Wage and Hour Division of the United States Department of Labor found to be due to the respective plaintiffs for overtime was offered to them by defendants before trial and refused, and the fact that the mandatory penalties imposed by the Act are severe, the fee of the attorney for the plaintiff should be limited to quite a reasonable one, and it is fixed at \$750.

12. Both generally speaking, and in the case of the Arsenal Building, there appears to be no particular correlation between labor costs and the fixing of lease rentals. 86

13. Defendants failed to prove that they relied upon any action or omission of plaintiff or other employees similarly situated in estimating labor costs or fixing lease rentals.

14. Defendants failed to prove a mutual mistake of either fact or law respecting applicability or non-applicability of the Fair Labor Standards Act, in connection with the entering into of the various agreements referred to in defendants' answer and particularly the so-called McGrady Agreement. 87

15. The employer representatives did not rely upon any statement or misstatement, or any act or omission, of union representatives, in connection with the negotiations leading up to the entering into any of the agreements referred to in defendants' answer and particularly the so-called McGrady Agreement.

16. Defendants failed to prove a mutual understanding of the parties to the negotiations leading up to the so-called McGrady Agreement, or any other agreement referred to in defendants' answer, as to any specific provision or actual terms intended to be included in or

*Findings of Fact and Conclusions of Law*

constitute their agreement as to wages and hours in the event that the Fair Labor Standards Act should apply.

17. Defendants delayed unreasonably in asking the relief sought by the counterclaim for reformation.

18. Officers of defendants have occupied space in the Arsenal Building for many years and spent a considerable amount of time there; at all times they were actually familiar with the nature of the duties of and work performed by plaintiff Meyer Greenberg and other employees similarly situated and knew the nature of the business of the various tenants in the building to constitute the manufacture and production of women's garments.

19. Defendants failed to sustain the burden of proving either a mutual mistake or a mistake upon the part of either party to the agreements sought to be reformed, as to:

(a). The nature of the duties of plaintiff Meyer Greenberg and the other employees similarly situated during the period in question;

(b) The nature of the business of the tenants in the Arsenal Building during the same period.

20. The evidence adduced by defendants was not sufficient to satisfy the court that but for the alleged mistake defendants or their representatives would not have assumed the terms and provisions of the agreements sought to be reformed.

21. Plaintiff was employed at a regular rate of pay in pursuance of his contract of employment, which definite regular rate of pay defendants obtained, in computing overtime compensation due plaintiff, and in keeping records with regard thereto, by dividing the fixed regular weekly wage by the fixed regular number of hours worked weekly.

*Findings of Fact and Conclusions of Law*

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22. On occasions when plaintiff Meyer Greenberg was absent due to illness or other similar circumstances, the amount deducted from his fixed weekly wage was obtained by dividing that compensation by the fixed regular number of hours worked weekly, then multiplying the resultant hourly rate by the number of hours absent, and deducting the total amount thus obtained from the usual amount of fixed weekly compensation.

23. Together defendants jointly supervised, directed and controlled plaintiff Meyer Greenberg and other employees similarly situated in the performance of their duties, exercised the power of hiring and discharging, made payments of wages and otherwise actively dealt with the employees and their representatives in matters of labor relations.

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24. Since about 1934, there have been in existence in New York City two associations of building owners and managing agents, known as Midtown Realty Owners Association, Inc. and Penn Zone Association, Inc. (called herein the Associations), whose members owned and managed real property located within the said Garment Center area and whose principal purposes were to advise their members with regard to their labor relations, to assist them in the negotiation of contracts with representatives of their building service employees and to promote friendly relations with the various unions in the field (Def. Ex. M., pp. 7 and 16).

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25. During the period covered by the complaint, defendant Arsenal Building Corporation was a member of the said Midtown Realty Owners Association, Inc.

26. During the period covered by the complaint, defendant Arsenal Building Corporation was a party to, and the said Arsenal Building was a signatory building



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*Findings of Fact and Conclusions of Law*

under, certain master collective bargaining agreements entered into between the said Associations, acting on behalf of their members, and certain labor unions including primarily Local 32-B, Building Service Employees International Union A. F. of L. (called herein the Union), acting on behalf of the members of said Union, governing the terms and conditions of employment of building service employees in the so-called signatory buildings owned or operated by the members of said Associations, to-wit, the so-called Extended Mahoney Agreement dated February 19, 1936, as amended by the so-called Alger Agreement dated May 21, 1937 and the Arbitration Award made thereunder and part of said Agreement known as the Alger Award, effective February 1, 1938, and the so-called McGrady Agreement, effective February 4, 1939, together with the so-called Wolff Award, effective August 4, 1940, made under and as a part of said McGrady Agreement. The said McGrady Agreement is typical of the collective bargaining agreements involved in this action and a complete copy thereof, being Plaintiff's Exhibit 3, is incorporated herein and made a part of this finding (Stip., Pl. Ex. 1).

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27. During the period covered by the complaint, plaintiff Meyer Greenberg and all other building service employees employed in the Arsenal Building were members of Local 32-B, Building Service Employees International Union A. F. of L. (Stip., Pl. Ex. 1).

28. During the period covered by the complaint, plaintiff Meyer Greenberg and all the other employees of the Arsenal Building were employed and paid in accordance with said collective bargaining agreements (Stip., Pl. Ex. 1).

29. During the period covered by the complaint, plaintiff Greenberg and all the other employees of the Arsenal Building were employed and actually worked, pursuant



*Findings of Fact and Conclusions of Law*

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to said collective bargaining agreements, on the basis of a specified maximum work week at a specified regular weekly wage and were paid at the rate of time and one-half for all hours worked in excess of such regular maximum work week (Pl. Ex. 3 and Def. Ex. A):

30. Plaintiff Meyer Greenberg in particular was employed and actually worked in the Arsenal Building during the following periods on the following basis:

October 24, 1938 to February 2, 1939— \$27.75  
per week for a 48-hour week

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February 3, 1939 to August 1, 1940— \$28.75  
per week for a 47-hour week

August 2, 1940 to February 5, 1942— \$29.33  
per week for a 46-hour week. (Stip., Pl. Ex. 1)

31. During the period between June 25, 1938, when the Act was passed and February 3, 1942 when the McGrady Agreement expired, no claim was ever made by the Union to the Associations or the Realty Board that the employees whom the Union represented were covered by and entitled to the benefits of the Act in any respect.

32. In the Wolff arbitration in August, 1940 under the McGrady Agreement wherein it was provided that, at the request of either party, the question of wages for the period from August 4, 1940 to February 3, 1942 should be arbitrated if the parties do not agree thereon, no claim was ever made by the Union that the employees whom it represented were entitled to the benefits of the Act in any respect.

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33. No claim was ever made by the Union to defendant Arsenal Building Corporation or defendant Spear & Co., Inc. that the members of the Union employed in the Arsenal Building were entitled to the benefits of the Act in any respect or to any other or different pay or rate

100 *Findings of Fact and Conclusions of Law*

of pay than that prescribed by the collective bargaining agreements involved in this case.

*Conclusions of Law.*

1. The court has jurisdiction to hear and determine the issues of this case under Section 41 (a), 28 U.S.C.A. [Jud. Code, Section 24] and Section 16 (b) of the Fair Labor Standards Act of 1938.
- 101 2. The second and complete defense which seeks equitable estoppel is insufficient in law and the defense is stricken.
3. The third and complete defense and counterclaim for reformation is insufficient in law and the defense should be stricken and the counterclaim dismissed.
4. The fourth and complete defense which pleads full payment and compliance by implication is insufficient in law and the defense should be stricken.
- 102 5. The seventh and partial defense which seeks to bar liquidated damages and an attorney's fee upon the basis of defendants' good faith and offer to pay the single amount due under the Act is insufficient in law and the defense is stricken.
6. The eighth and partial defense which seeks to bar liquidated damages and an attorney's fee upon constitutional grounds, is insufficient in law and the defense is stricken; Section 16 (b) of the Fair Labor Standards Act is constitutional as here applied.
7. Existence of an employer-employee relationship based upon collective bargaining agreements does not alter the obligation of an employer to comply with the requirements of the Fair Labor Standards Act of 1938.
8. Employees paid in accordance with standards established under collective bargaining agreements are not

*Findings of Fact and Conclusions of Law*

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barred from seeking recovery of back wages, liquidated damages and attorney's fees under the Fair Labor Standards Act of 1938.

9. Employee and employer cannot, by private agreement, circumvent the public policy expressed in the Fair Labor Standards Act, and it is equally without merit to say that a party may be estopped from seeking his rights under the Act because he has not claimed them earlier.

10. Neither good faith upon the part of a defendant nor hardship can excuse a failure to comply with provisions of the Fair Labor Standards Act of 1938.

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11. An alleged mistake or ignorance upon the part of a party as to the provisions of a particular statute or the applicability of the statute to a specific situation cannot constitute a legally sufficient basis for equitable reformation of an agreement.

12. Defendants are barred by their own laches and delay from the right to resort to equity for the relief sought in the counterclaim for reformation.

13. An offer of settlement or tender in the single amount of unpaid overtime compensation due under the Fair Labor Standards Act which does not include an additional equal amount as liquidated damages is an inadequate offer or tender.

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14. Defendant Spear & Co. Inc. was, during the period covered by the complaint, an "employer" of the plaintiff Meyer Greenberg and other employees similarly situated within the meaning of Sections 3 (d) and 16 (b) of the Fair Labor Standards Act.

15. Together defendants jointly acted as "employers" of plaintiff Meyer Greenberg and other employees similarly situated within the meaning of Sections 3 (d) and 16 (b) of the Fair Labor Standards Act.

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*Findings of Fact and Conclusions of Law*

16. Defendants violated Section 7 of the Act in failing to pay plaintiff Meyer Greenberg and other employees similarly situated overtime compensation in accordance with the provisions of Section 7.

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17. Accordingly, plaintiff Meyer Greenberg in behalf of himself and as agent and representative in behalf of the other employees similarly situated named above may have judgment for unpaid overtime compensation, together with an additional equal amount as liquidated damages in each case, the indicated attorney's fee and the costs of the action, as against both defendants; and the amount due may be collected from defendant Arsenal Building Corporation or from defendant Spear & Co. Inc.

Dated: October 7, 1943.

HENRY W. GODDARD  
U. S. D. J.

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## Transcript.

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UNITED STATES DISTRICT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Before:

HON. HENRY W. GODDARD,

District Judge.

New York, February 8, 1943, 10:30 A. M.

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Appearances:

VICTOR J. HERWITZ, Esq., and JAMES L. GOLDWATER, Esq.,  
Attorneys for Plaintiff.

McLANAHAN, MERRITT, INGRAHAM & CHRISTY, Esqs., At-  
torneys for Defendants; Robert R. Bruce, Esq., Kenneth  
C. Newman, Esq., and John J. Boyle, Esq., of Counsel.

Mr. Herwitz: Just so that I am clear on the record,  
I have therefore moved to strike all of the defenses and  
counterclaims which have been interposed by the defend-  
ants and which have not been withdrawn.

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The Court: Well, as you indicated at the start, you  
would make your motions for dismissal, and the Court  
will reserve decisions upon your motions to dismiss the  
various affirmative defenses.

Mr. Herwitz: Thank you, your Honor. Now, if your  
Honor please, I will proceed to the proof of my case.  
I will now offer as Plaintiff's Exhibit 1 the stipulation of  
the parties.

(Marked Plaintiff's Exhibit F.)

Mr. Herwitz: If your Honor please, at this time I  
would like to offer 21 authorizations, authorizing Meyer  
Greenberg to sue on behalf of the various other em-

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*Plaintiff's Witness, Leon R. Spear, Direct*

ployees similarly situated, who are named in the stipulation, paragraph 2 thereof.

Mr. Bruce: Tell us which ones are not covered.

Mr. Herwitz: Those not covered are Julius Falcheck. He is not included in the list; Santiago Balara, and Jerry Suarez. Those three are not included among the authorizations. As to those that I previously stated, I am trying to locate them.

The Court: I understand. If you get them before the case is closed, then the defendants withdraw the objection—is that right?

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Mr. Bruce: That is correct, as to those men.

Mr. Herwitz: I ask that this be marked Plaintiff's Exhibit 2.

(Marked Plaintiff's Exhibit 2.)

Mr. Bruce: Consisting of 21 papers in the same form?

Mr. Herwitz: That is correct. I would like at this time to call Mr. Leon Spear as plaintiff's witness.

LEON R. SPEAR, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination by Mr. Herwitz:*

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Q. What business are you in, Mr. Spear? A. I am with Spear & Co., Inc.

Q. Is that the company which is a co-defendant in this action? A. Yes, sir.

Q. What position do you hold in Spear & Company? A. I am vice president.

Q. How long have you held that position? A. About twenty years.

Q. What business is Spear & Company in? A. Spear & Company is in the management, sales, renting, appraisals of commercial property, in the City of New York.

Q. Where are their offices, that is, of Spear & Company? A. 225 Fifth Avenue.



*Plaintiff's Witness, Leon R. Spear, Direct*

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Q. Does Spear & Company have any other offices?

A. Spear & Company maintains a branch renting office in the building at 463 Seventh Avenue.

Q. Is that office in the building known as the Arsenal Building, owned by the Arsenal Building Corporation?

A. Yes.

Q. And that is the owner which is a defendant in this action? A. Yes, sir.

Q. How long have you maintained an office in the Arsenal Building? A. About five years.

Q. Where do you personally maintain your office?

A. Well, I spend a good deal of time at the branch office, 463 Seventh Avenue

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Q. I see. What street is that on? A. The northeast corner of 35th Street and Seventh Avenue.

The Court: That is where the old arsenal was?

The Witness: The old arsenal, yes. It was auctioned by Governor Smith.

The Court: Yes.

Q. Mr. Spear, do you hold any office in the Arsenal Building Corporation? A. Yes.

Q. What office do you hold? A. Secretary.

Q. How long have you held that office? A. I would say about five years.

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Q. Who is the president of the Arsenal Building Corporation? A. Mr. Max Schneck.

Q. Is Spear & Company the managing agent of the Arsenal Building, 463 Seventh Avenue? A. Yes, sir.

Q. How long have you been—when I say you, I refer to Spear & Company—how long has Spear & Company or you been the managing agent of the Arsenal Building Corporation? A. Ever since the day it was completed, February 1st, 1925.

Q. And as such agent has Spear & Company managed that building? A. Yes.

*Plaintiff's Witness, Leon R. Spear, Direct*

Q. Will you tell the Court exactly what is meant by the term "manage" in connection with that building?

A. By "management," we rent the premises, take care of any of the complaints of the tenants; we supervise the complete operation, physical and otherwise, account by statement to the owners every month, and generally supervise and administer the property, with the necessity of getting the approval on some things from the owner.

Q. Generally would you say that Spear & Company has carte blanche in the management of that building?

A. No, we do not have carte blanche excepting in ordinary routine administration work in the renting of the property. Anything that has to do with money we have to get approval.

Q. Well, in the— A. Rather, spending it.

Q. In the building service, that is, the servicing of the building, does Spear & Company direct and manage that? A. Yes.

Q. Does Spear & Company direct what one might term the labor policy of the building? A. Yes.

Q. Does Spear & Company have the right to hire and fire employees? A. Spear & Company has the right to hire and fire employees but in that particular building the right of hiring and firing of employees is put absolutely and completely in the control of the superintendent.

Q. Would you say that as a matter of practice Spear & Company has delegated that right to the superintendent? A. Yes.

Q. But does Spear & Company have supervision over the superintendent? A. Yes, sir.

Q. And you direct him, whenever direction is necessary, in the operation and maintenance of that building? A. Yes, sir.

Q. And you have the right so to do? A. Yes, sir.

Q. Do you have that right under your contract with the Arsenal Building Corporation? A. Yes.

*Plaintiff's Witness, Leon R. Spear, Direct*

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Q. And is that one of the things that you were hired or employed to do? A. Yes.

Q. Then if— A. Of course, that would not mean if the owner were in the building and saw something going on that he could not direct us to direct the superintendent to do it.

Q. Yes. By that you mean the owner might withdraw his delegation of authority to you in a particular respect?

A. That is right.

Q. But as a matter of practice you are in charge of that? A. Yes.

Q. Does Spear & Company maintain an account, a bank account, a separate bank account for the Arsenal Building Corporation? A. No.

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Q. That is put in with general funds? A. Yes, sir.

Q. Do you pay the salaries of the employees of the Arsenal Building Corporation? A. Yes. That is, a check is drawn. Our method of paying is this: A check is drawn to the order of the superintendent, who in turn goes to the bank and cashes this check. He makes up his pay roll and he personally makes up each envelope and pays each man what he is entitled to for the period he worked that week.

Q. Now, who fixes the salary or wages of the various employees? A. Well, those salaries have been fixed for us by our contract with the union.

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Q. Before you had a contract with the union who fixed the salaries or wages of the employees? A. Well, it was fixed by us in conjunction with many others, I presume, which was a custom that sort of grew up as to what we should pay. In many cases owners would pay differently, all depending on how a man felt about what he ought to pay his men. There wasn't any regular process of paying these men.

Q. Mr. Spear, I think you may not understand my question. Spear & Company directly or through the su-

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*Plaintiff's Witness, Leon R. Spear, Direct*

perintendent of the Arsenal Building hires the employees of that building, does it not? A. Yes.

Q. Now, you have the right, Spear & Company has the right through the superintendent to fix the salary of those employees—do you not? A. No, that salary is fixed by our contract with the 32-B.

Q. Don't you mean, Mr. Spear, that your contract with 32-B requires you to pay a certain minimum wage; isn't that so? A. It requires us to pay a minimum wage.

Q. Yes. A. It requires us to pay a wage that is fixed.

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Q. It requires you to pay a certain fixed minimum wage to your employees? A. Yes.

Q. And there is nothing in your contract with 32-B which prevents you from paying your employees anything you wish in excess of that minimum?

Mr. Bruce: Your Honor, I object to that question. The contract being in evidence, will speak for itself.

The Court: Quite right.

Mr. Herwitz: At this time I ask that the testimony of this witness as to the requirements of the contract be struck as not responsive to my questions.

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The Court: I do not think I understand your motion, Mr. Herwitz.

Mr. Herwitz: Well, I asked that his reference to these contracts, to the contract or the agreement, be struck out at this time, and I will introduce now or at a subsequent time the union contract—

The Court: Any objection to that?

Mr. Bruce: Well, except Mr. Herwitz asked a question. I suppose he is bound by the answer.

The Court: I should think that is what usually follows.

*Plaintiff's Witness, Leon R. Spear, Direct*

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Mr. Herwitz: I think I am only bound by a responsive answer.

The Court: You are quite right on that. You move to strike it out on the ground that it is not responsive?

Mr. Herwitz: Not responsive.

The Court: I will have to hear the question again. There were two questions, were there not? (Record read.)

The Court: I think you asked him the questions. I do not think they should go out. I think they are responsive, good answers.

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Mr. Bruce: But the objection was it was too responsive.

The Court: I beg your pardon?

Mr. Bruce: The objection was that it was too responsive.

The Court: That is a new one. Of course, the most satisfactory proof is the contract.

Mr. Herwitz: Yes. I am looking for it now, your Honor. (Confers with Mr. Goldwater.) Do you have a copy of the union contract?

Mr. Bruce: The McGrady agreement?

Mr. Herwitz: The McGrady agreement.

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Mr. Bruce: It is Exhibit A of the answer (handing to counsel).

Q. I show you Exhibit A of the defendants' answer, and ask you whether that is an agreement known as the McGrady agreement, which was a collective bargaining agreement between Local 32-B and various associations (handing)? A. Yes, sir.

Q. Is that the agreement to which you refer? A. Yes, sir.

Mr. Herwitz: I offer that—

A. (Continuing) This is one of a number of agreements.

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Q. Yes; and aren't the others similar? A. Well, they are agreements; they are not entirely similar, There are some changes made.

The Court: A little later I would like to know—

A. (Continuing) They are not entirely the same. There have been some changes made from time to time as the agreements were renegotiated.

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Mr. Bruce: We will concede, your Honor, that the other agreements Mr. Herwitz refers to are substantially similar except that the provisions as to wages and hours may vary from time to time.

The Court: Well, for the information of the Court, I ought to know perhaps whether this is the agreement or whether it isn't.

The Witness: Well, this is the McGrady agreement that was agreed to after a long series of negotiations and was signed to cover the period from February 4, 1939, to February 3, 1942.

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Mr. Bruce: Your Honor, this one—the McGrady agreement is one of three agreements which will be referred to and relied upon in this case—the first of those agreements is known as the extended Mahoney agreement, referred to in the answer, paragraph 11, I think it is. The second is the McGrady agreement which was negotiated and became effective on February 4, 1939, and ran for three years up to February 4th, 1942. The third agreement on which we rely is the Meyer agreement, which became effective on February 4, 1942, and is now in effect.

The Court: Is it correct to say that there were three agreements; one the Mahoney agreement,



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the next the McGrady agreement, and then the Meyer agreement?

Mr. Bruce: Yes.

The Court: They were successive agreements?

Mr. Bruce: Correct, substantially similar in their general provisions with respect to working conditions; the primary differences being, I think, that the minimum wages and hours applicable in the various periods—

The Court: But it is offered in evidence, I understand.

Mr. Bruce: Mr. Herwitz offered it.

Mr. Herwitz: I have offered it.

Mr. Bruce: If he did not, I offer it for him.

(Marked Plaintiff's Exhibit 3.)

The Court: I will call that the McGrady agreement.

Mr. Bruce: Yes.

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Q. Mr. Spear, I call your attention to paragraph 2 of the McGrady agreement, which reads as follows: "From the effective date hereof to and including August 3, 1940, the following wage provisions are required to be complied with. All employees herein provided for shall receive an immediate increase in their weekly wage of One (\$1) Dollar. In no event shall any employee be paid less than the minimum rate of wage as follows:"—and then in Class A Buildings—I am skipping—those are buildings where the gross area is more than 280,000 square feet, "the minimum weekly rate shall be \$27.75. Existing differentials of wages between the various classes of workers shall be maintained throughout the term of this agreement." Now, is it based upon that paragraph that you say the amount of wages paid is not fixed by Spear & Company but by the collective bargaining agreement? A. Yes.

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Q. As a matter of fact, you pay the employees of the Arsenal Building more money than is set forth as the minimum wage in this agreement? A. That is right.

The Court: You say is or are paying? Do you mean to limit your question to the present time? Apparently you did, as I heard it.

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Q. During the period covered by the McGrady agreement which we are now referring to, you paid your employees more money than the amount of wages set forth in the McGrady agreement as the minimum wage, did you not? A. That is true, but there is—

Q. I know, but I presume that you did that, and that would be in pursuance of that paragraph or that part of the paragraph which I read to you, which provides for a blanket increase of one dollar? A. That is right.

Q. Is that right? A. Plus the—

The Court: I wish you would speak a little louder. Mr. Herwitz: I am sorry.

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A. (Continuing) Plus the elastic clause that the differential should be maintained, and I think you have to go back to the original agreement to get the significance of why we paid more than the minimums provided for in the McGrady agreement.

Q. Yes. You have always been, Mr. Spear, on the negotiating committee representing the Association that negotiated with the union, have you not? A. That is right, yes.

Q. That entered into these collective bargaining agreements. A. Every one of the agreements since the inception of the union.

Q. And therefore you are fully familiar with them? A. Yes, thoroughly.

Q. And it is, as you know, not contrary to these agreements for you to pay anything above what is required to pay under the union contract, if you so desire?

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Mr. Bruce: Your Honor, I object to that. The agreement speaks for itself on that point.

Mr. Herwitz: May I argue this point? I submit, your Honor, that the position which he holds as vice president—

The Court: I should think we need not discuss it. Is there any doubt about that?

Mr. Bruce: Well, I am going to object to this testimony on a much broader ground. I would like to have Mr. Herwitz tell us how this is material to his case.

Mr. Herwitz: It is material to our case in this respect, your Honor, that we are charging the defendant Spear & Company with liability in this action because—

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The Court: I think they have been let out, haven't they?

Mr. Herwitz: No. The Arsenal Annex Corporation has been let out. The only purpose of this testimony has to do with the liability of Spear & Company as, in the words of the statute "standing in the place of an employer." The witness, I think, is obviously—well, in a sense a hostile witness, and I think his statement that the wage policy is fixed by the collective bargaining agreement is one that I cannot allow to stand without controverting it since it is not obviously so. I think the witness has jumped in to abide by the defense before the time. I think I should be allowed virtually to cross examine him even though technically he is my own witness.

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The Court: Well, when it comes down to it, it is this: You ask whether or not there is anything in the contract preventing his company or the Arsenal Building Corporation from paying more than the minimum figures stated in the contract. I cannot see why that is objected to.

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Mr. Bruce: I will withdraw the objection, your Honor.

Q. Well, will you answer that question? A. No, there is nothing in the contract.

Q. As agent of that building, as managing agent of that building, you have the right, unless you are overruled specifically by your employer, to pay your employees or the employees of the building whatever you see fit.

A. Well, it would work the other way around. We would have to get the approval of the owner before we could do it.

Q. Well, do you get the approval of the owner before you fix any of the salaries of the individuals? A. Oh, yes.

Q. Do you get the approval of the owner before you hire any new employee? A. No.

Q. And when a new employee is hired, do you confer with the owner before you fix a salary? A. No. Well, those salaries are fixed for us.

Q. Who fixes those? A. The contract fixes them for us.

Q. Well, it only fixes the minimum payment, doesn't it? A. It fixes the very salary.

Q. It fixes the minimum payment? A. No, it does better than that. If you go into that contract you will find a clause there that says whatever is the prevailing rate paid this man is the rate you pay, so that fixes it for us.

Q. Isn't it a fact that that merely— A. It just happens that this building has a prevailing rate which is higher than the minimum, and the reason for that, to go back to the inception of the agreement, under the original agreement, the Mahoney agreement—

Q. Yes, I understand. A. (Continuing) —but you will find why we have more than the minimum.

Q. Isn't it a fact that although the agreement says that where there is a replacement you must pay the prevailing rate, that that still is a prescription of the minimum

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for your building? There is nothing to prevent you, according to your contract with the union, to pay more than the prevailing rates if you want to?

The Court: That is a long question.

Mr. Herwitz: Yes; I will unscramble it.

Mr. Bruce: Yes. I will ask Mr. Herwitz to reframe it. I did not even understand it.

Q. Mr. Spear, is there anything in this union contract that you have referred to that prevents you, Spear & Company, from hiring employees at a rate in excess of the minimum rates prescribed in the contract? Is there? A. No, there is nothing in it—

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Q. There isn't? A. —nothing in it excepting with the approval of the owner, I would like to get that in.

The Court: I couldn't get that. You dropped your voice.

The Witness: We would have to get the approval of the owner. There is nothing in the contract that says we cannot pay an employee as much money as we want to; but that permission would have to be given by the owner of the building.

Q. In other words, so far as the union contract is concerned, you still have to get the owner's approval for it?

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A. Yes, if it were more than the wages fixed by the contract, yes.

Q. Oh, your contract with the owner is that if you pay more than the salaries that are set forth, or the minimum set forth in the union contract, that you have to get the owner's approval? A. Well, we would naturally have to.

Q. Well, I did not ask you whether you would naturally have to. Is that your agreement with the owner? A. When it comes to the spending of money we cannot get the approval of the money for all expenditures of moneys.

Q. Mr. Spear, I wanted to ask you whether I understood that you said that you had an understanding or an

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agreement with the owner that in the event you paid employees more than the minimums prescribed in the union contract you must get specific authority from the owner so to do? A. I did not say that.

Q. You do not mean that, do you? A. I said this—

Q. Wait a second. You do not mean that, do you?

Mr. Bruce: Let the witness explain. This is a very simple proposition. Let him explain that to you. You do not seem to understand the contracts.

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A. I say this, that if we were to recommend a higher payment of wages than as prescribed by the contract with 32-B, we would have to get the permission of the owner to pay it.

Q. Then I did not understand you. Is that pursuant to your written contract with the owner? A. No.

Q. Is that pursuant to some oral agreement with the owner? A. That is pursuant to the regular process and the management of that property since 1925.

Q. Well, in 1925 there was no union, was there? A. No.

Q. There was no union until 1934? A. No.

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Q. So for at least nine years of that period this union contract had nothing to do with your right to hire employees at more than any prescribed minimum? A. No, but any sums of money that we would obligate ourselves to pay for the benefit of the owner would have to have his approval. That goes for any sums of money.

Q. Even if the sum of money that you wanted to pay was in conformity with the union contract? A. No.

Q. Well, now— A. That is a fixed proposition.

Mr. Bruce: Just a minute, Mr. Spear. Will you raise your voice. I do not believe the Judge can hear you. Sometimes I can't.



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The Court: I have great difficulty in understanding him at times.

Q. Mr. Spear, I just want to be clear about what your testimony is. Do I understand that you, Spear & Company, must get specific authority from the owner of this building, the Arsenal Building Corporation, before you are allowed to pay an employee a wage in excess of the minimum wage prescribed in the union contract? A. Yes, sir.

Q. Is that requirement that you obtain such authorization from the employer contained in your written contract with the employer? A. I do not know whether it is, but if it isn't, it is a practice that we have carried on since we managed not only this building but any building in our management.

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Q. Yes. Now, I did not ask you, Mr. Spear, about your practice. I asked you about what you were required to do and I asked you whether or not you are required to do what you say you are required to do by reason of any written contract with your employer? A. I would not know whether it is in writing in the contract or not.

Q. Suppose I show you the agreement and then you tell me whether under the written agreement you are required to do what you now say you are required to do (handing)? A. Where is it?

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Mr. Bruce: Why don't you offer that contract in evidence.

A. (After examining) Yes.

Mr. Herwitz: I offer page 320 of the record, the Circuit Court of Appeals record of Fleming v. Arsenal Building Corporation. Defense counsel has agreed with me—

The Court: Page 320?

Mr. Herwitz: Pages 320, 321 and part of 322.

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*Plaintiff's Witness, Leon R. Spear, Direct*

Defense counsel has agreed with me that we can use the record.

The Court: What case is that?

Mr. Herwitz: That is Fleming v. Arsenal Building Corporation.

Mr. Bruce: May I state what it is, your Honor?

The Court: Yes.

Mr. Bruce: It is the Plaintiff's Exhibit 31, set forth at pages 320 to 322 inclusive of the transcript of record in the case of Fleming v. Arsenal Building Corporation, in the United States Circuit Court of Appeals for the Second Circuit, October Term, 1941. There is no objection to its being offered.

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(Marked Plaintiff's Exhibit 4.)

Mr. Bruce: Am I correct in assuming, Mr. Herwitz, that all this examination goes to the question as to whether or not Spear & Co., Inc., is an employer within the meaning of the Act?

Mr. Herwitz: That is correct.

A. (Continuing) I do not see anything in here that says that we have to get their permission to pay wages or pay increases or spend any money.

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Q. Then you must rely upon some oral agreement with the owner, is that right? A. Well, we rely on more than that. We rely on the practice in the management of real estate not only for these owners but for banks, trust companies, insurance companies, and for anybody for whom we manage.

Q. All right. Let me confine it. You have never had any oral agreement with the employer in this case in line with what you say the limits of your ability are and have been?

Mr. Bruce: Your Honor, this is indulging too much in the manner of cross examination. It is true that this man may be regarded as a hostile

witness in a certain sense, but that does not permit Mr. Herwitz to cross and recross and cross and recross over the same subject. The witness has carefully explained, I think, that whenever the wages paid to employees were in excess of those required by the contract, whether at the minimum or above the minimum, because they were above the minimum by virtue of differential, that he had to get the approval of the owner, the Arsenal Building Corporation, and that was pursuant to practice. He has not said anything about oral agreement here. The testimony is perfectly clear and I see no reason for wasting a lot of time on this tack.

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Mr. Herwitz: Are you through?

Mr. Bruce: Yes. And I object to any further questioning about oral agreements and so on. It has been clearly stated what his practice was.

The Court: Well, there is no unanswered question, is there?

Mr. Herwitz: Yes, your Honor. Mr. Spear has claimed that his authority is limited in the hiring of help to what was in accordance with the union contract, and that he may not employ workers in the building at a rate in excess of the union contract. I am seeking to determine from this witness whether or not that is the fact.

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The Court: I think you can get at the facts, notwithstanding that you have called him as your witness. He is perfectly able to protect himself and give us the true picture.

I will allow these questions unless you carry it too far.

Mr. Herwitz: Yes. Well, I will take your Honor's suggestion. When it gets too far all right, but I think since he has made the statement, and it is

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pertinent to the inquiry, I ought to find out when, where, and under what circumstances his authority was so limited.

The Court: Go ahead.

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Q. Was your authority limited in the respect you say it has been limited by reason of any oral agreement that you have had with the employer of this building? A. Well, I don't remember specifically any oral agreement, but I am sure that at some time during our association over the years the question of increasing pay or making certain expenditures must have been talked about, or the practice wouldn't go.

The Court: You are, of course, bound by the witness's answers.

Mr. Herwitz: Yes, of course.

Q. In other words, you remember no oral agreement, is that correct? A. Well, I don't remember specifically a conversation, but when you have been doing something for seventeen years, as we have been doing it in this particular building, there must at one time have been some understanding or we wouldn't continue the practice.

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Q. Now, how can you have had an agreement or understanding for 17 years when there have only been union contracts in the last nine?

Mr. Bruce: I object to the form of that debate.

The Court: Yes, I think that is entirely too far.

Mr. Herwitz: All right.

Q. Now, have you examined Plaintiff's Exhibit 4, the contract between yourself and the employer? A. Well, I merely read to see whether there was in there any writing somewhere giving us authority or not giving us authority to pay those wages.

Mr. Bruce: He referred to Plaintiff's Exhibit

4. Is that the—

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Mr. Herwitz: The contract.

Mr. Bruce: The contract of agency?

Mr. Herwitz: That is right.

Q. Under this contract—

Mr. Herwitz: I think I ought to read it into the record, your Honor, or call your Honor's attention to part of it.

Mr. Bruce: It is already in evidence. Why read it in?

Mr. Herwitz: I am not going to read the whole thing. I am just going to read a part of it.

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"Seventh: It is further understood and agreed that the Agent shall employ the necessary help, make any necessary purchases, advertise when necessary, contract for and make necessary repairs and the payment therefor, and pay for all expenses in relation to the operation and maintenance of the building for the account of the Owner, such expenses to be deducted monthly and the vouchers therefor shall accompany each monthly statement.

"Eighth: The Agent is hereby authorized to take any action at law or equity which it should deem necessary or appropriate for the purpose of enforcing collection of money due from tenants or to repossess any portion of the premises which may be necessary or convenient for the management thereof."

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Mr. Bruce: Are you reading it for your own information, Mr. Herwitz?

Mr. Herwitz: Part of it, yes.

The Court: We will take a short recess.

(Short recess.)

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*Plaintiff's Witness, Leon R. Spear, Direct*

Q. Spear & Company has the responsibility of managing this property, does it not? A. Yes, sir.

Q. It is charged with that responsibility by the Arsenal Building Corporation? A. Yes, sir.

Q. I think I have covered this, but just to make sure, you direct the superintendent of the building in the hiring and firing of employees?

Mr. Bruce: I object to that. It has been covered before.

Mr. Herwitz: Maybe. I am not sure.

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Mr. Bruce: Yes, you did. You covered it two or three times.

Q. Just a question or two more, Mr. Spear. In the selection of employees at the Arsenal Building Spear Company acts as the agent for the Arsenal Building Corporation, does it not? A. Yes:

Mr. Herwitz: That is all.

Mr. Bruce: No questions.

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Mr. Herwitz: If your Honor please, do you have any objection to my withholding proof concerning counsel fees until the end of the case—if it is agreeable to Mr. Bruce?

The Court: All right. That is satisfactory to the Court.

Mr. Herwitz: Then subject to that and the authorizations, the plaintiff rests.

The Court: By the authorizations, you refer to the—

Mr. Herwitz: Missing ones.

The Court: The other authorizations of those three who are named as plaintiffs but from whom you have not as yet obtained the authorizations.

Mr. Herwitz: That is correct, your Honor.



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Mr. Bruce: Your Honor, at this time I wish to call your attention to the fact that the case was discontinued by the stipulation, Exhibit 1 in evidence, against the defendant Arsenal Annex Corporation. Bearing that in mind, I move to dismiss the complaint.

Mr. Herwitz: Consented to.

The Court: It was discontinued by stipulation, was it?

Mr. Bruce: That is correct. Plaintiff's Exhibit 1 in evidence.

The Court: As to Arsenal Annex Corporation.

Mr. Bruce: That leaves two defendants in the case: Arsenal Building Corporation, which is the owner of the building, the employer of these plaintiffs, according to my contention, and Spear & Co., Inc., which is the managing agent of the building, and which, according to Mr. Herwitz, is also the employer. We have two employers here under his contention.

Defendants move to dismiss the complaint as against the remaining defendants Arsenal Building Corporation and Spear & Co., Inc., and I take it that your Honor would choose to reserve decision at this time.

The Court: Yes.

Mr. Bruce: Your Honor, defendants offer in evidence, after showing the papers to plaintiff's counsel, a document known as the extended Mahoney agreement of February 19, 1936, and the modification of the extended Mahoney agreement dated May 21, 1937, which are offered as one document. They are named for Jeremiah Mahoney, who was the arbitrator and sponsor of these agreements. All of these agreements take their names from men who participated as mediators or arbitrators.

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The Court: And the date of that is what?

Mr. Bruce: February 19, 1936—and the other is a modification of the extended Mahoney agreement dated May 21, 1937.

Mr. Herwitz: If your Honor please, I am not objecting to the introduction of these documents on failure of complying with the formal rules of proof. I am not questioning the authenticity. However, I do object to the introduction of these documents on the ground that same are not relevant or material to the issue.

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At this time I would like to ask you to reserve for me a general objection to the entire line of testimony which may be adduced relative to these collective bargaining agreements, as not being relevant and material to the issues involved in this case, as not in any way being binding upon the plaintiff Greenberg, as not in any way constituting a contract of employment between Greenberg and the defendant, and for the various other reasons which must be apparent to your Honor from the argument this morning and the statements made by me relative thereto. I do not want in the course of the trial to continuously object to the introduction of testimony relative to these agreements by each question, but I would like to preserve my record and make my objection and take whatever exception will be required.

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The Court: These will be taken subject to your objection. Is that what you wish?

Mr. Herwitz: That is right, and not only in reference to these documents but to all testimony relative to these collective bargaining agreements, which I assume is about to come. I object to all questions in regard to that and I would like to ask your Honor to give me an objection to that entire

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line without the necessity of my taking it separately.

The Court: On the ground that they are irrelevant and immaterial?

Mr. Herwitz: Correct, your Honor.

The Court: And on any other ground?

Mr. Herwitz: Not on the ground of competency. If I have any other ground, I will make that objection separately, in addition.

On the further ground, too, of course, just so that it will be clear, that none of the defenses which have been interposed are good in law, and therefore any evidence adduced relative thereto is immaterial and irrelevant.

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Mr. Bruce: Well, I understand your position clearly. This can be said, though. If your Honor chooses to follow Judge Rifkind's decision holding sufficient at least the defense and counterclaim of equitable reformation, all of these documents and all of the evidence that will follow on this point are both material and relevant because we cannot reform the contract unless we can get it in evidence. The Court has said—the Honorable Judge of this Court has said that we can reform similar documents to these, so I do not think there is much to that objection, if there is anything to Judge Rifkind's decision.

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Mr. Herwitz: I would like to object to these documents, too, on the further ground that they relate to a period prior to the effective date of the Wage and Hour Law and prior to the period covered by the complaint.

(Marked Defendants' Exhibit A.)

Mr. Bruce: I offer in evidence, your Honor, an arbitration award known as the George W. Alger award, in an arbitration between Midtown Realty Owners Association, Inc., Penn Zone Association,

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Inc., and Greater New York Council of the Building Service Employees International Union, dated February 9th, 1938.

This award was handed down by Mr. Alger as arbitrator under the extended Mahoney agreement, Defendants' Exhibit A, during the life of that contract.

(Marked Defendants' Exhibit B.)

Mr. Bruce: Now, to keep the chronology of these agreements straight, Mr. Herwitz has offered the McGrady agreement, which is the next in line of these agreements, having been marked Plaintiff's Exhibit 3.

Then defendants offer the arbitration award known as the Wolff award, which is dated October 6, 1940, between the same associations, Midtown and Penn Zone and Union Local 32-B Building Service Employees International Union.

(Marked Defendants' Exhibit C.)

Mr. Bruce: Then defendants offer an agreement known as the Meyer Agreement, between the Midtown and the Penn Zone Associations and Locals 32-E, 164 and 32-J—the latter two unions being irrelevant to this situation—of Building Service Employees International Union, which agreement was effective February 4th, 1942, and expires February 3rd, 1945. This agreement is the collective bargaining agreement which is now in effect governing the wages, hours, and working conditions of the employees of the defendant Arsenal Building Corporation, and this agreement became effective the day before the day up to which these plaintiffs sue, to wit, February 5, 1942.

Mr. Herwitz: I would like to add an additional ground of objection to this exhibit, to wit, that the agreement offered covers a period subsequent to the period covered by the complaint and for

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which we are seeking the overtime compensation, etc. In other words, in our complaint we seek overtime compensation, liquidated damages for violation of the Wage and Hour Law by the employer for the period up to February 3, 1942. We have made no claim for the period covered by the Meyer Agreement which is now offered. As a consequence it has no relevance or materiality to the issues presented in this case.

The Court: What do you say to that?

Mr. Bruce: Your Honor, it will appear very clearly from the testimony about to be offered as to why this is relevant. If Mr. Herwitz presses his objection and is not willing to let it go in evidence now, I am willing to have it marked for identification and offer it later. However, his complaint does state a cause of action, as I understand it, up to February 5th, so that this agreement covers at least two days of the plaintiff's cause of action. I am not relying on it primarily for that reason, although that is a good reason for its being admissible, but I am relying on it, as will appear more fully from the testimony, because it shows exactly what this union and these employees agreed to when it became apparent after the decision of the Circuit Court of Appeals on December 30, 1941, that the Wage and Hour Law might be held applicable to this relationship. This contract was executed by this union with these employers before the Supreme Court decided the Arsenal case, and it contained certain provisions, as a matter of caution, showing that the parties wanted to bring themselves into full compliance with the Act and remove all doubt, and it contains a formula for determining the hourly rate, which shows what the union would have done and what this employer would have done in 1938 if it had

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apprehended the true implication of the Wage and Hour Law. It is entirely irrelevant to the counter-claim sustained by Judge Rifkind.

Mr. Herwitz: If your Honor please, I do wish to press my objection to the introduction of this document. In the first place, although it purports to have been executed and to be effective from February 3, actually it was executed sometime after February 3.

Mr. Bruce: That is correct—retroactive back.

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Mr. Herwitz: Retroactively back to February 3. As I am asking for damages up to February 5, 1942, but Mr. Bruce does claim, I think, that maybe because February 5th was the last pay day under the prior contract—

Mr. Bruce: Well, do you withdraw your claim for the days of February 4th and 5th?

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Mr. Herwitz: No, I do not. Your Honor, as Mr. Bruce has just stated, what they are attempting to do apparently is to show what the union would have done or what the parties to these collective bargaining agreements would have done in 1939 had certain things been true or not true, by showing what they did three years later. It seems to me that if you want to show the intention of parties in 1939, that to say what they did in 1942, three years thereafter, when many things have intervened to change local and world situations and make the minds of the parties entirely different than it could possibly have been in 1939, I think it is entirely too far-fetched to make it relevant and material to the issue. It may be that in the course of the testimony they will show its relevancy and materiality, but I think at the present time there has been no such showing and I think it certainly should not be let in until there is.



*Defendants' Witness, Meyer Greenberg, Direct*

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Mr. Bruce: Well, we will have it marked for identification.

The Court: Yes.

(Marked Defendants' Exhibit D for identification.)

Mr. Bruce: Your Honor, Plaintiff's Exhibit 3, the McGrady Agreement, was marked in evidence and is attached to the answer. I think inasmuch as examination is going to require handling of it, it would be more convenient if we had it marked in a separate booklet. Is that satisfactory to you?

Mr. Herwitz: May I see it?

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Mr. Bruce: Yes.

Mr. Herwitz: Because some of these printed copies are different from the others.

(Booklet handed to Mr. Herwitz.)

Mr. Bruce: Is that all right?

Mr. Herwitz: Yes.

Mr. Bruce: This is the same as Plaintiff's Exhibit 3, but a loose copy.

The Court: Take out the other and physically replace it.

Mr. Bruce: Yes. I will call Mr. Greenberg.

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MEYER GREENBERG, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

*Direct Examination by Mr. Bruce:*

Q. Mr. Greenberg, you are the plaintiff in this lawsuit, are you not? A. Yes.

Q. You live in New York City? A. I live in Brooklyn.

Q. In Brooklyn. That is in New York City though, isn't it?

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*Defendants' Witness, Meyer Greenberg, Direct*

The Court: Now Mr. Greenberg, you will have to talk so we can hear you, or else we will have to do something else.

The Witness: Yes, your Honor.

The Court: Talk loudly.

A. I live in Brooklyn, New York City.

Q. You are employed by the Arsenal Building Corporation, are you not? A. I am.

Q. Do you carry a social security card with you? A. Yes, sir.

191 Q. May I see it?

The Court: Is your question whether he is still employed?

Mr. Bruce: Yes.

(Witness produces card.)

Q. Your Social Security number is 059-07-5994, is it not? A. Yes, sir.

Q. What is this name that appears on the reverse of this card (indicating)? A. Arsenal Building Corporation.

Q. Is that your employer? A. That is my employer.

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The Court: I cannot hear you. Let us get this on the record. When were you first employed—

Mr. Bruce: I am getting at that right now.

The Court: All right.

Q. I just want to get the answer to this question because I want to identify that for another purpose. That is going to be the next question.

Mr. Herwitz: I object to that question.

Mr. Bruce: What was the question?

(Question read.)

Mr. Herwitz: I object to that question and move to strike it out as calling for a conclusion.

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The Court: Let me see that.

(Same handed to the Court.)

The Court: When you were asking him, is that your employer, you were referring to Arsenal Building Corporation?

Mr. Bruce: That is correct, as shown on the reverse side of his social security card.

The Court: Well, I think you may ask him: Is the Arsenal Building Corporation of 8794 Bay Parkway, Brooklyn, the employer referred to in this action—

Mr. Bruce: All right.

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The Court: Is that your question?

Mr. Bruce: That is all right.

The Court: I should think you had better ask that question.

Q. What is your answer to that? A. My address is in Brooklyn, but I don't remember. I give that because we had on the sign "Arsenal Building." I am working long enough, and I thought I remember "Arsenal Building." That is the reason I gave it in.

The Court: I couldn't understand that.

Mr. Bruce: I did not either. Do you want that stricken out?

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Mr. Herwitz: No, I do not want that stricken out.

Mr. Bruce: Did you hear it?

Mr. Herwitz: Yes.

Mr. Bruce: I did not hear it.

The Court: I cannot understand it.

Mr. Bruce: I couldn't, either.

A. (Continuing) When the lawyer came in—

Q. Just a minute. The Judge asked you a question which you did not answer. I think the question was, is the Arsenal Building Corporation which is named on the

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reverse side of your social security card the employer referred to in that card? A. I am not sure on them, but I saw all the time on the door, "Arsenal Building," and I put it in, when the lawyer came in, and in fact I registered myself under that name, "Arsenal Building Corporation."

The Court: The address given on this card—

The Witness: My address.

The Court: —is 8794 Bay Parkway, Brooklyn, New York. Is that the address of the Arsenal Building Corporation?

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The Witness: No, your Honor. My address.

Q. But is the Arsenal Building Corporation which is referred to on the back of that card, the employer; is it referred to in that card? Yes? A. Repeat again?

Q. Is the Arsenal Building Corporation referred to on your Social Security card—the employer referred to on that card? A. No, myself.

Q. Oh, you are your own employer? A. No. I did not put it down myself. The name when I registered, I didn't ask nobody.

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Q. Oh, did you write the name, Arsenal Building Corporation, on there? A. I write it on there.

Q. And you wrote it on there because the Arsenal Building Corporation is your employer? A. Because that is what I did believe.

The Court: Here is your card, Mr. Greenberg (handing to witness).

Mr. Bruce: I will offer this in evidence. We will put a photostatic copy in, Mr. Herwitz, so that we won't have to keep this card here.

Mr. Herwitz: Yes.

(Deemed marked Defendants' Exhibit E.)

Q. When were you first employed at the Arsenal Build-

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ing, Mr. Greenberg? A. I don't remember what year but I guess about 15 years ago, on the freight side.

Q. Strike out "the freight side." I did not ask you how you were employed. I asked you when you were employed.

The Court: For the past fifteen years he said he was employed—

The Witness: That is the first job.

The Court: In the Arsenal-Building Corporation. Is that what he says, because I cannot understand it very well. Is that what you say? You have been employed by the Arsenal Building Corporation for the past 15 years; is that right?

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The Witness: Not all the time steady, but the first job I did get there about 15 years ago, or 16 years ago.

Mr. Bruce: Your Honor, would you instruct the witness to confine his answers to the questions? He has a tendency to go on and spill after he has answered the question.

The Court: That was, I think, a good answer. He said, in substance, that he has been there about fifteen years, but not continually.

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Mr. Bruce: Yes, that is true, that is a good answer, but I was referring to some other material that none of us heard, and I would rather like to know—

The Court: Well, I can give him instructions but it does not get the result you want. He does not speak plainly nor loudly.

Mr. Bruce: Yes, it is difficult. I would rather like to know, and I think both Mr. Herwitz and you agree with me as to what the witness is testifying to, but I would like to know what is going on the record.



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Q. Who is Henry Greenberg? Wasn't he a relative of yours? A. Who?

Q. Henry Greenberg. A. Yes, sir.

Q. Was he the man who built the Arsenal Building?

A. Yes, sir.

Q. And didn't Henry Greenberg personally employ you to work in the Arsenal Building? A. Yes, sir.

Q. That was before the Arsenal Building Corporation, which is the defendant whom you are suing here, owned the building, isn't that so? A. I don't remember at that time the name, for what they have been called.

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Q. But didn't the ownership of the Arsenal Building change about 1935? It was transferred from the company that built it to the Arsenal Building Corporation?

A. This I don't know.

Q. You do not recall that? A. No.

Q. But you were employed by the man who built the building originally? A. I am employed like I say I am employed now, by the superintendent.

The Court: What is his job?

Q. What are your duties at the Arsenal Building?

A. Elevator operator.

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Q. And how long have you been an elevator operator?

A. For the last fifteen or sixteen years, but continuing, a couple of years I have been working on construction.

Q. Are you a member of Local 32-B? A. Yes, sir.

Q. And you carry your union card? A. Yes, sir.

Q. Were you a member of Local 32-B in 1934 when it was first organized? A. Yes, sir.

Q. That is you joined Local 32-B when Local 32-B first started organizing the Building Service Employees of New York, isn't that so? A. Yes, sir.

Q. And have you been a member in good standing ever since 1934? A. Yes, sir.

Q. What position do you hold with the union? A. Just a good standing member.



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Q. And you are the shop steward at the Arsenal Building, are you not? A. I used to be for a few months.

Q. When were you shop steward? A. From May till last month.

Q. May of 1942? A. Yes, sir.

Q. Up to January, 1943? A. To the end of December.

The Court: You might put on the record what a shop steward is.

Mr. Bruce: I was going to ask him that.

Q. What are the duties of a shop steward? Well, I will put it this way: What were your duties as shop steward at the Arsenal Building Corporation? A. To help collect dues instead of the board to every one collect or everyone they should have the trouble to bring him in the office, they elect one of them and he collect the money for them and gives it over to the collector, he gives to collect. That is all what we have, and in case when there is trouble in the agreement I have to call up the union for that and they straighten out but no power in anything.

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Q. When the men in the Arsenal Building have grievances it is the duty of the shop steward, is it not, Mr. Greenberg, to take those grievances up with the owner of the building or his representative? A. No. The owner can say he don't have no business with me. That is all what I have to spend my nickel to call the union for them. It means I am a servant, not an officer.

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Q. Have you ever had any discussions— A. Never.

Q. —with any representative of the owner of the building about working conditions in the building? A. Never.

Q. What is the name of the official magazine of Local 32-B? A. "Building Service Review."

Q. Isn't the correct title "Building Service"? A. "Building Service."

Q. How long has that been published to your knowl-

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edge? A. The first time I see was only one page ad when we was striking in the first strike.

Q. Back in 1934? A. I guess on that date.

Q. And has "Building Service" been published continuously from that date, to your knowledge? A. I am not sure but I guess we start to receive monthly after that.

Q. Do you get it every month? A. Yes, sir.

Q. Have you had it every month since October, 1938? A. Yes, sir.

Q. Do you read it every month? A. Sometimes; not all the time.

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Q. Do you recall who the officers of the union were in October, 1938? For example, who was the president of the union in October, 1938? A. In 1938, Mr. Bambrick.

Q. Mr. Bambrick. James J. Bambrick? A. James J. Bambrick.

Q. And who was the treasurer of the union? A. David Sullivan.

Q. Mr. Sullivan is now the president of Local 32-B? A. Yes, sir.

Q. Who was the recording secretary of the union at that time? A. I can—

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Mr. Bruce: Do you mind if I lead him a little bit, Mr. Herwitz?

Q. Do you recall it was Mr. Thomas Young? A. No, he was the vice president, I guess.

Q. But he was an officer? A. He was an officer.

Mr. Herwitz: I think at that time he was recording secretary.

Q. He was recording secretary? A. He is not recording secretary. Before he was vice president, then he changed around.

Mr. Herwitz: Can I get into this?

Mr. Bruce: No, I would rather steer this ship for a while.

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Q. Do you recall that Mr. Arthur Harekham was a vice president of the union? A. I guess so. To tell you the truth I used to leave that and I didn't pay attention for the officers. To me it makes no difference who the officers are. I did not attend no meetings because I was too busy.

Q. That is all right, Mr. Greenberg. Have you ever heard of the scale committee of Local 32-B? A. I heard there is a scale committee but I couldn't name no name. I don't know them.

Q. What is the function of a scale committee in your union? What are its duties? A. If they have a motion, something, but to make it they make a motion and put in a demand. 212

Q. It is the function of the scale committee to negotiate contracts with the building owners for the union, is it not? A. I don't know.

Q. You don't know? A. I don't know what they have to do.

Q. Do you recall an agreement known as the McGrady Agreement? A. I know there is a couple of agreements but I do not even know where is our agreement—what is the name of the agreement from the Penn Association, the Middle Town Association. 213

Q. Did you ever read the McGrady Agreement in the Building Service magazine? A. I read a few of them, not all of them.

Q. Well; did you ever read the McGrady Agreement? A. No.

Q. Did you ever read the Meyer Agreement? A. I didn't read them.

Q. I show you what purports to be the April, 1939, issue of Building Service, which has a picture on the front, and I ask you whether that refreshes your recollection as to who the union scale committee was in 1938 and 1939. Read it carefully before you answer and tell me whether that refreshes your recollection as to who

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the scale committee was (handing)? A. If you will allow me, my glasses are in my coat. Can I get my glasses?

The Court: Yes, certainly.

(Witness leaves stand and changes glasses.)

A. I know a few fellows from them, but I don't even know what work they do in here.

Q. Will you read that and tell me whether it refreshes your recollection as to who the scale committee was back in 1938, back in 1939?

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Mr. Herwitz: Can I help you, Mr. Bruce?

Mr. Bruce: Will you stipulate who they were?

Mr. Herwitz: Well, if it says so in the magazine I will stipulate that they were.

Mr. Bruce: All right.

Mr. Herwitz: And if it turns out to be wrong, we will correct it.

Mr. Bruce: That is fine. That will save a lot of time. The question is withdrawn, and Mr. Herwitz will stipulate subject to correction that the union scale committee in December, 1938, and January and February, 1939, was composed of—

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Mr. Herwitz: May I see it first?

Mr. Bruce: Yes, surely (hands to Mr. Herwitz). I think I will offer that page. Do you object to it? I mean just so the Court can see what a jubilant scale committee looks like.

Mr. Herwitz: I object to this magazine.

Mr. Bruce: I haven't offered it. I merely asked you to stipulate.

Mr. Herwitz: If you want to stipulate the names of the persons who were on the scale committee, unless it should turn out that that is not so, I will do so.

Mr. Bruce: All right. Subject to correction, counsel for the plaintiff stipulates that the scale

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committee of Local 32-B in December, 1938, and January and February, 1939, composed the following men: James J. Bambrick, president. David Sullivan, secretary-treasurer. Arthur L. Harckham, vice president. Manuel Severino, Frank Gold and Thomas Young.

Q. What I would like to ask you, Mr. Greenberg, is this; of what council of Local 32-B were you a member?  
A. Council No. 3.

Q. And who was the head of your council?

Mr. Herwitz: When?

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Q. Who was the head of your council in 1938, December, and January, 1939, if you remember?

Mr. Herwitz: Do you want me to stipulate that?

Mr. Bruce: Yes.

Mr. Hertwitz: Thomas Shortman.

New York, February 9, 1943,  
10:30 o'clock A. M.

Trial resumed.

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Mr. Herwitz: Your Honor, I have just been informed that Plaintiff's Exhibit 2, which I said contained 21 authorizations, contains 22 authorizations, a miscount. I just want to note that on the record.

The Court: And there are three others that are still open, which makes the total 25, is that correct?

Mr. Herwitz: That is correct.

The Court: You said you had authorizations from 22 and there were three that you were waiting to obtain authorizations from?



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Mr. Herwitz: Yes. Of course that did not include Mr. Greenberg, who, being the party, there is no authorization for.

The Court: Then that makes a total of 26?

Mr. Herwitz: 26. I do not think I said anything about Mrs. Halley, who is a widow of a former employee, concerning whom we have an agreement, but I will put that in before the record is complete.

Mr. Bruce: She is not involved in this suit.

Mr. Herwitz: That is correct.

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Mr. Bruce: Well, I was through with Mr. Greenberg. Do you want to cross examine him?

Mr. Herwitz: No.

Mr. Bruce: All right. Mr. Brown.

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MELVIN BROWN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

*Direct Examination by Mr. Bruce:*

Q. Mr. Brown, what is your business? A. Real estate management and brokerage.

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Q. How long have you been engaged in that business in New York City? A. In the management end over 16 years.

Q. In 1938 what company were you connected with? A. The Lefcourt Realty Corporation.

Q. In what capacity? A. Vice president and general manager.

Q. What were your general duties in that connection? A. Management of properties.

Q. Commercial properties as distinguished from residential properties primarily? A. Yes.

Q. Were those properties confined to any particular area in New York? A. In those years in the garment district only.



Q. And what is the garment district that you refer to, roughly? A. Roughly from 34th Street to about 40th Street, between Fifth Avenue and Ninth Avenue.

Q. And referred to as the garment center for what reason? A. Because that is where ladies' garments are manufactured.

Q. In 1938 were you a member of the Midtown Realty Owners Association or the Penn Zone Association? A. I was a member of the Midtown Realty Owners Association.

Q. How long had you been a member of that Association at that time? A. Probably since 1935.

Q. And were you a member of the negotiating or the labor negotiating committee that represented that Midtown and Penn Zone Associations? A. I was.

Q. When did you first become a member of that negotiating committee? A. Immediately after the November 1, 1934 strike.

Q. What was the occasion of that strike?

Mr. Herwitz: I object to that, if your Honor please. That is entirely irrelevant and immaterial to the issues involved in this case.

The Court: I should not think that is material. What is your point?

Mr. Bruce: Well, it isn't really material. I merely wanted to bring out that that was when Local 32-B commenced the organization of building service employees. You do not object to that statement? I will only ask that one question.

Mr. Herwitz: I think it is entirely irrelevant.

The Court: Well, merely for the purpose of fixing a date.

Mr. Bruce: I will withdraw the question and ask this:

Q. When to your knowledge, Mr. Brown, did Local 32-B commence organization of building service employees in New York City? A. During the year 1934.

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Q. And it was that year when you first became a member of the negotiating committee of these two associations?

A. No, I believe it was the early part of the following year, 1935.

Q. Tell the Court briefly what these two associations are made up of and what their primary function is.

227 Mr. Herwitz: If your Honor please, I wish to renew my objection to this entire line of questions and all matters concerning the nature and character of this association or of the collective bargaining agreements, as entirely irrelevant and immaterial to the issues involved in this case. I ask your Honor to give me a general objection to this entire line in line with my statement yesterday.

The Court: Yes.

Mr. Herwitz: Thank you, your Honor.

Mr. Bruce: I might point out that it was Mr. Herwitz who introduced without reservation the McGrady Agreement, which is the principal labor agreement upon which we rely and to which these two associations are parties.

228 Mr. Herwitz: If your Honor please, to make the record clear, the McGrady Agreement was introduced with relation to the testimony of Spear and related solely to the capacity of Spear as the employer or standing in the place of the employer of the employees involved here, and the McGrady Agreement was introduced in connection with his statement as to the limitations of his authority, nothing else. It was not introduced for the purpose that Mr. Bruce says now it was introduced for.

Mr. Bruce: It was introduced without reservation. Do you mind if I lead the witness on these questions? It will save my time and your time.

Mr. Herwitz: Anything that will save time and not produce an error of judgment I am in favor of.

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Mr. Bruce: All right. Read that last question, Mr. Stenographer, will you, please?

Q. (Read.)

Mr. Bruce: I will withdraw that question.

Mr. Herwitz: May I also renew my objection—

The Court: The question is withdrawn.

Mr. Herwitz: All right.

Q. The members of these two associations, the Midtown and Penn Zone are individuals, firms or corporations engaged primarily in the ownership or operation or management of real property in the garment center area and the Penn Zone area, are they not? A. They are.

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Q. Approximately how many buildings would you say are owned by members of those two associations? A. About 110.

Q. It is one of the primary functions of these two associations, and has been since 1934, to collectively deal with Local 32-B with respect to the wages, hours and working conditions of building service employees employed in the members' buildings, is that correct? A. That is correct.

Q. Now, how many building service employees, approximately, would you say were employed in the years 1938 and 1939 in these member buildings of the two associations? You need not pin yourself down too closely; just approximately. Give the Court some idea of how many employees were involved. A. I should say about 3,500 or 4,000, somewhere in that neighborhood.

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Q. Made up of all classifications of building service employees: Elevator operators, porters, maintenance men, firemen and so on? A. Yes.

Q. And is it a fact that most of the buildings that are members of the Midtown and Penn Zone Associations are so-called loft buildings as distinguished from office buildings? A. Practically all of them.

Q. And how do you define a loft building?

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Mr. Herwitz: I object, your Honor.

The Court: How does he define a loft building?

Mr. Bruce: Yes.

The Court: Well, is that—

Mr. Bruce: It really is not material except I think it might become material later on.

The Court: Does the statute make a distinction between loft buildings and office buildings?

Mr. Bruce: I am not disputing coverage. I want to bring out anyway that most of these buildings are in competition for the same type of tenant, and I think that is a fair question.

The Court: I think he may answer it. I think in a case of this kind, too, without a jury, the Court should be pretty liberal in receiving testimony. It may turn out to be immaterial and should not be received, but I think I will take that chance because there is no great harm done if it is included in the record.

Mr. Herwitz: Will you just note my objection to it?

The Court: Yes.

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A. A loft building is a building in which the tenants use the space for manufacturing or sale or showing of merchandise, and a great many of these buildings are sprinklered. That is one of the distinguishing features as against an office building. Another distinguishing feature is that in loft buildings the tenants clean their own premises, whereas in an office building the tenants receive cleaning services in their offices.

Another feature of the loft building is, as distinguished from an office building, that it has a separate freight entrance for the carrying of freight or merchandise, whereas that is not usually so in an office building.

The Court: Mr. Herwitz, I do not now see how this is material. I think it is probably harmless

and I should prefer to take it and then exclude it because I do not think I know enough about the case as yet.

Mr. Herwitz: I will at the close undoubtedly make a motion to strike the testimony, but I must note my objection to your receiving it. I can understand your Honor's position in receiving it and I take cognizance of it.

Mr. Bruce: Of course, Mr. Herwitz's position is that all this testimony that I am about to offer is immaterial. That is understood.

Mr. Herwitz: Yes, of course.

Mr. Bruce: He has to take that position in order to maintain his claim here. Of course, Judge Rifkind's decision in the Adams case, I think, indicates that it is all material.

The Court: I haven't had a chance, as you well know, to study Judge Rifkind's decision or the facts and the law in the case sufficiently to rule definitely on it now.

Mr. Bruce: Your Honor, there have been some of us engaged in this subject for a year now and we do not feel with any confidence that we know all the answers yet, so it is perfectly understandable that you are feeling your way a little bit in this case. This is a very important litigation—

Mr. Herwitz: All litigations are important.

Mr. Bruce: Well, it is important in the sense that it involves the welfare of most of the loft building owners in New York City. It involves tremendous sums in back wages if these claims are sustained.

Mr. Herwitz: I move to strike out the remarks of Mr. Bruce; entirely unnecessary and irrelevant. I do not know what the purpose of putting them in the record is. I would say that this was very important because any litigation is.



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The Court: I will let it stand. Statements by counsel are not evidence.

Mr. Bruce: Surely. I did not have any intention at all except to follow up your remark.

The Court: I suppose if he made that at the end of the trial, when it came to the argument, it would have been perfectly all right. Made now it is probably a little out of place.

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Q. From your 16 years of experience as a real estate man in the garment center area would you say, as a layman, that most of these 100-odd buildings that you have referred to are in competition with each other for tenants?

Mr. Herwitz: I object to the form of the question, in addition to the other grounds.

Mr. Bruce: The question seems to me perfectly competent, your Honor.

The Court: Of course I should think the Court would take judicial notice that the owners of buildings in that neighborhood compete with one another to get tenants.

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Mr. Bruce: You could not take notice of that unless you know the buildings are all of the same character, as the witness has testified, and I merely followed it with the logical question.

The Court: Go ahead and answer it.

A. All of these buildings are in competition with one another.

Q. Do you recall when the first collective contract was entered into between Midtown and Penn Zone Associations and Local 32-B Building Service Employees Union?

A. Well, the first agreement that I recall was in March of 1935. I am not sure that 32-B as such was a party to that agreement, but it was with the Midtown and Penn Zone Associations, and it may have been with the



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Greater New York Council. I am not sure as to who represented the union at that time. March, 1935, to the best of my recollection, was the first industry agreement.

Q. You recall, do you not, the negotiation and execution of the Extended Mahoney Agreement in February, 1936, which is Defendants' Exhibit A in this case? A. Yes, sir.

Q. You recall, do you, that that agreement was modified by an agreement dated May 21, 1937? A. I do.

Q. And you recall the negotiations and execution of the so-called McGrady Agreement? A. I do.

Q. In February, 1939? A. I do.

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Q. Which is marked Plaintiff's Exhibit 3 in this case. Now, you have been a member of the negotiating committee that negotiated those three agreements, have you not? A. I have.

Q. With the union negotiating committee? A. That is right.

Q. Is it a correct statement that the basic pattern of those agreements with respect to wages and hours has been that of setting a minimum wage for various classifications of employees for a specified work week?

Mr. Herwitz: I object to the question, your Honor, on the ground that the agreements speak for themselves.

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The Court: I think your objection should be sustained.

Mr. Bruce: Your Honor, you allowed Mr. Herwitz to go into that a little bit yesterday. I was just going to clarify the point that he examined Mr. Spear on to some extent, to show that while these agreements do set minimum wages, that by their terms they require that the wages above that minimum existing when the agreements became effective shall be maintained. I just want to bring that out because, as I recall, Mr. Herwitz did go into that

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with Mr. Spear a little bit yesterday. I just wanted to refresh my memory on that point so that you would have the basic pattern of these agreements without having to wade through them now. As a practical proposition, if you sustain Mr. Herwitz's objection a lot of this discussion may be meaningless to you unless you go to the agreements now.

The Court: I would like to avoid that, but it seems to me you are asking this witness something which, if objected, I must sustain because you are asking about the contents of these contracts.

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Mr. Bruce: I think under ordinary circumstances the objection would be well founded, and I merely—I suppose Mr. Herwitz himself will regret this later.

Mr. Herwitz: I will wait until that time comes.

Mr. Bruce: That may be too late for me. I am trying to give the Court a proper picture of this case as we go along.

Mr. Herwitz: I have no objection to—

Mr. Bruce: Do you press your objection?

Mr. Herwitz: Yes, I do—

Mr. Bruce: That is all. What is your ruling, your Honor?

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The Court: I think it should be sustained. I think the fact that you wish to demonstrate could be argued.

Mr. Bruce: That is true, but it always seems to me that particularly in view of your statement that you are not too familiar with the setup of the case, it might have more meaning for you because this is a perfectly harmless question.

The Court: I should like to have the question answered.

Mr. Bruce: Yes.

The Court: But I still am bound by the rules of evidence.

Mr. Bruce: You would like to have the question answered, but Mr. Herwitz doesn't want to have it answered.

Q. Mr. Brown, do you recall the negotiations that took place in December, 1938, and January and February, 1939, near the expiration date of the so-called Extended Mahoney Agreement, which is in evidence as Defendants' Exhibit A? A. I do.

Q. Who were the members of the negotiating committee representing the Midtown and Penn Zone Associations at that time? A. Well, Leon Spear, Mr. Lawrence D. Mayer and myself. 248

Q. Was your committee represented in the negotiations at that time by counsel? A. It was.

Q. And who was your counsel? A. Mr. Walter Gordon Merritt, and I believe Mr. Henry Clifton, Jr.

Q. Is this Mr. Merritt here, who just walked into the courtroom, who represented you (indicating)? A. Yes.

Q. And Mr. Clifton who is on military service, I believe? A. Right.

Q. Who are the members of the union negotiating committee that met with you at that time, as you recall them?

A. Mr. James J. Bambrick, president of the union, Mr. David Sullivan who, I think, was treasurer of the union at the time. 249

Mr. Bruce: Is Mr. Sullivan in the courtroom today?

Mr. Herwitz: Mr. Sullivan is here. I produced him pursuant to the request of counsel. He just stepped outside.

A. (Continuing) And Mr. Arthur Harckham, who I believe was secretary. I believe Mr. Palatnik and Mr. Severino and Mr. Thomas Young.

Q. Mr. Young just walked into the courtroom, didn't he? A. That is right—and Mr. Harckham also.

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Q. And Mr. Sullivan is here now? A. Right.

Q. That whole jubilant scale committee we were talking about.

Mr. Herwitz: I beg your pardon?

Mr. Bruce: That whole jubilant scale committee is here, I almost offered in evidence yesterday.

Mr. Herwitz: I suppose that is relevant!

251 Q. Did you have a number of meetings with the union negotiating committee, Mr. Brown, during that period we speak of, December, 1938, to January and February, 1939? A. Quite a number.

Q. Ordinarily where did you hold those meetings? A. Why, I think we started at the Garment Center Capitol Club.

Q. And that is located on Seventh Avenue in the heart of the garment center, is it not? A. In 1938 Seventh Avenue it was at the time.

Q. Do you recall whether at that time the union presented any written demands for a new contract to succeed the so-called Extended Mahoney Agreement? A. They did.

252 Q. And those written demands were the basis of the negotiations between your respective committees, were they not? A. They were.

Q. Do you recall whether the union made any specific demand with respect to hours? A. I believe that their demand was for a 40-hour week.

Q. Had Local 32-B ever demanded a 40-hour week before from these two employer associations? A. I believe that their demands from the very beginning of the formation of the union were for a 40-hour week.

Q. And that was in 1934, was it not? A. Right.

Q. Do you recall when the Federal Wage and Hour Law was passed? A. I believe in the fall of 1938.

Q. If I refresh your recollection and lead you a little

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bit, it was passed in June, was it not, effective three months later in October, 1938? A. Right.

Q. So that when the union presented this demand for a 40-hour week the Federal Wage and Hour Law was in effect, was it not? A. Yes.

Q. And you say that the union even as far back as 1934 had asked for a 40-hour week? A. That is the best of my recollection.

Q. Do you recall whether or not in the so-called Alger Arbitration under the Extended Mahoney Agreement the question of a 40-hour week was in issue? A. I believe it has always been an issue and was in issue at that time.

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Q. Isn't it a fact that in the Alger Arbitration, which culminated in an award by Mr. Alger on February 8, 1938, that the union demand for a 40-hour week was rejected? A. It definitely was.

Mr. Bruce: And that award, your Honor, is in evidence as Defendants' Exhibit B.

Q. In these negotiations in late 1938 and early 1939, did the union ever relate its demand for a 40-hour week to the Federal Wage and Hour Law? A. Not at all.

Q. Was there ever any discussion of the Federal Wage and Hour Law in any of these meetings between your respective union and the employers' committees? A. There were a number of discussions of the Federal Wage and Hour Law.

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Q. Discussion by whom? A. By both sides sitting around the table.

Q. Do you recall any particular discussions or do you have a general recollection of such discussions? A. I have a general recollection that both sides were quite confident that because we were service industry that we were exempt under the Act.

Mr. Herwitz: I move to strike that out and I ask that both the question and the answer be



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stricken on the ground that it is irrelevant and immaterial, and on the further ground that it is not binding on the plaintiff Greenberg in this action. On the further ground that the time and place is not even fixed, even if it were relevant.

The Court: I did not hear that last.

Mr. Herwitz: On the further ground that the time, the place, the circumstances and the author of these alleged statements are not identified.

Mr. Bruce: Are you through?

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Mr. Herwitz: Yes.

Mr. Bruce: Well, No. 1, there cannot be any question about the relevancy of the question. Under a counterclaim alleging mutual mistake of law as to the application of the Federal Wage and Hour Law, next, as to the fixing of a time and place, the time has been fixed as being throughout the negotiations in December, 1938, and January, 1939. The place has been fixed as the Garment Center. It is taxing memory a little bit too much to go any further, and we are not through with this line of questioning, Mr. Herwitz.

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Mr. Herwitz: Well, I think we ought to ascertain whether or not the plaintiff Greenberg was present when these alleged statements were made.

Mr. Bruce: We will stipulate that Mr. Greenberg was not present, but the stipulation, your Honor, which is in evidence as Plaintiff's Exhibit 1, indicates that Mr. Greenberg at all times during this period was a member of this union with these associations.

The Court: State the conversation with officers of the union.

Mr. Bruce: That is correct, and those were officers of Greenberg's union dealing on his behalf. The stipulation states that these contracts which



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Mr. Herwitz himself offered in evidence were made on behalf of the members of the union.

The Court: I will take it subject to the objection.

Mr. Herwitz: May I have the last question and answer read, please?

(Record read.)

Q. Mr. Brown, will you tell the Court to the best of your recollection what the union representatives in these negotiations said about the Wage and Hour Law, the Federal Wage and Hour Law, and what your representatives said about it, and identify, if you can, the people who made those remarks. 260

Mr. Herwitz: I object again specifically to this question on the ground that the plaintiff Greenberg was not present, and I wish for the record to state my objection to any statements made not in the presence of the plaintiff Greenberg.

The Court: Yes.

Mr. Herwitz: And for the other reasons previously urged.

The Court: Yes, Mr. Herwitz; your objection is noted.

Q. Was my question clear, Mr. Brown? A. Yes. 261

The Witness: Your Honor, in these various negotiations it was the custom for both sides to sit around the table, sometimes in informal discussion and sometimes where an arbitrator was present in formal discussions. I remember clearly that this particular question was the subject of discussion with all of the members of the negotiating committee of both sides, including their counsel and ourselves, and that there was unanimous agreement that this Fair Labor Standards Act had no bearing on this service industry.

Q. Do you recall any particular individuals or any particular representatives of the union who made such state-

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ments? A. I believe that we all joined in the discussion. I can't pick out any one particular conversation, but there was a general agreement among all present. I believe everybody took part in the discussion.

Q. Did any of the union negotiators in the discussion of the subject of the Federal Wage and Hour Law ever state the reasons why they believed that the Federal Wage and Hour Law was not applicable to the building service men employed in these garment center buildings?

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Mr. Herwitz: I do not know whether I should specifically object to that question or whether my objection goes to that.

The Court: Your objection will go to this, as you have a general objection to this line. If you object to the form of the question or to a particular question on different grounds or new grounds, I wish you would call it to my attention.

Mr. Herwitz: Yes.

The Court: But otherwise you need not do it. You have a general objection to this line of testimony.

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Mr. Herwitz: Yes. Well, I object to this particular question because of its form, because it asked for the operation of somebody's mind, because it asked for an opinion of somebody concerning the law, which I think is entirely irrelevant.

The Court: So far as your objection is based on the fact that it calls for the operation of the witness's mind, I have always thought that that was a useless objection. Of course you cannot conceive of a question that does not call for the operation of a witness's mind.

Mr. Bruce: That is right.

Mr. Herwitz: Well, not for the witness's mind but where he is purporting to give the operation of

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somebody else's mind, what reason some of the many people at this conference might have had—

The Court: Mr. Herwitz, as I understand the question, it was this: Can you recall the reasons given—I think that is a proper question.

Mr. Herwitz: All right, your Honor.

A. There were two reasons—

The Court: That is as I understood it.

Mr. Herwitz: Yes.

The Court: If you would like to have the question read, all right; I may be wrong on it.

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Mr. Herwitz: No, you are perfectly right, your Honor.

Mr. Bruce: That is the question; I think I asked "Do you recall if any reasons were given," but you are correct. That is the burden of this question.

The Court: You are not asking this witness's reasons?

Mr. Bruce: No.

The Court: You are asking what reasons were stated?

Mr. Bruce: And specifically by the union negotiators.

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The Court: Yes.

Mr. Herwitz: I would also like to say that I think it is entirely unfair for this witness to testify to what the union negotiators said without identifying them. I have no way of rebutting this witness's testimony by calling anybody because he does not identify the person who made the statement.

The Court: Couldn't you give us an idea who was present so that Mr. Herwitz should know?

Mr. Herwitz: He has said who was present, but he hasn't said that they all spoke in chorus. If

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they all made the statement then he should so state. If these statements that he is now repeating were made by all of them in chorus, separately, jointly or severally, that is one thing; but he does not identify them. How am I to ascertain how the statements were made, and how can I be able to call witnesses to rebut it if I desire?

The Court: How many were present?

The Witness: There were probably at least half a dozen on the side of the union, exclusive of counsel.

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The Court: If you can do so I wish you would tell us who made the statements you are testifying about, and if you cannot say Mr. A or Mr. B, say it was one of a group.

Q. Yes. If you do not recall who made these statements at least say that it was a member of their group. Obviously it would have to be a member of the group that was there. Just tell us who that group was so that Mr. Herwitz can, if he objects, call all of that group. A. Well, perhaps I can be helpful in this respect, that in those negotiations Mr. Bambrick usually spoke for the group and while others joined in, Mr. Bambrick was really the spokesman.

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Q. Did Mr. Sullivan often do any talking in those negotiations? A. Yes. He and all the members of the union committee talked.

Q. And Mr. Edward C. Maguire, who was their counsel at that time? A. Right.

Q. Now will you, Mr. Brown, tell us, if you recall, what reasons were given for any of these union negotiators at that time for their belief that the Federal Wage and Hour Law did not apply to the particular employment relationship involved? A. There were two reasons given: One was that we were not engaged in interstate commerce, being buildings or affecting employees working in

buildings located on real property, and the other was that we were a service industry, and service industries were exempt under the Act.

Q. Do you recall who among that group—and if you do not recall say so—assigned those particular reasons, from the union side of the table? A. Well, I believe it was probably Mr. Bambrick. I can't say so positively because as I say we all joined in these discussions and each had something to say at different times on the subject.

Q. And did the members of your committee express their reasons for their belief as to the non-application of the Act to this employment relationship? A. There was perfect agreement as to the two reasons I mentioned.

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Q. In those negotiations in December, 1938, and January, 1939, was there any discussion of a State Wage and Hour Law? A. There was.

Q. Will you tell us what you recall of that discussion? A. My recollection is that when we got to the offices of Mr. McGrady for the arbitration of points which had not been settled, that someone pointed out that there had been a bill introduced in Albany providing for a State Fair Labor Standards Act, and there was discussion as to the effect of that upon the ensuing contract, and it was felt that some language should be put into the contract to provide a course of action in the event that such a bill was enacted, and the discussion, as I remember it, was that the union committee felt that if there were any lowering of the number of hours to be worked as a result of the State enactment, that nevertheless if the hours were reduced the wages would remain the same. The employers' viewpoint, of course, was that the matter should be left open for discussion in the event that there was such an Act. I believe as a result of the hearing before Mr. McGrady the matter was left to him and a clause was written into the McGrady Agreement providing that if there were an enactment affecting hours—

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Mr. Herwitz: I object to your characterizing it. The agreement is in evidence and it can be read from.

Q. All right, Mr. Brown. You have referred to some discussion before Mr. McGrady about the State Wage and Hour Law. Those discussions were held after February 1, 1939, were they not? A. Definitely.

Q. Do you recall whether or not in the discussions of the two negotiating committees prior to February 1st that there was a discussion of a State Wage and Hour Act? A. I don't believe there was.

Q. Were there minutes kept by your group of the negotiations in December and January, that we are speaking of? A. There were.

Q. And were copies of those minutes furnished to you? A. They were.

Q. Will you examine the minutes of January 20, 1939, and see if they refresh your recollection as to whether or not there was any discussion of subject prior to your meetings with Mr. McGrady (handing to witness)? A. (After examining) The minutes show that there was a discussion at this meeting.

Q. Does that refresh your recollection now as to the nature of the discussions that took place in those meetings before you met Mr. McGrady? A. Yes.

Q. Now will you tell the Court what the position of the union was on the subject of the State Wage and Hour Law and what the position of the employers group was on that subject as it was discussed between the two committees in those negotiations?

Mr. Herwitz: Now before he gives that I would like to ascertain whether his recollection has really been refreshed or whether he is merely repeating what he read in those minutes.

Mr. Bruce: Do you want me to put these in evidence?

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Mr. Herwitz: Well, I would like to examine them.

Mr. Bruce: All right (handing to Mr. Herwitz).

Mr. Herwitz: Might we have a short recess, your Honor?

The Court: Will it take a little while?

Mr. Herwitz: Yes, I think it might.

The Court: Very well.

(Short recess.)

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Mr. Bruce: Will you read the last question, please, Mr. Stenographer?

Q. (Read.)

Mr. Herwitz: I withdraw my objection as to the form of the question.

Q. This is in the negotiations prior to your meeting with Mr. McGrady? A. The position of the union was that if there was a reduction in the amount of hours by a State law, that the hours of the workers were to be automatically reduced, but that their wages were to remain the same. The position of the employers was that there was to be no automatic action but that the matter was to be discussed and reopened in the event of such an enactment.

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Q. And these positions were taken, were they not, with respect to a proposed clause in the new agreement, succeeding the Extended Mahoney Agreement? A. That is correct.

Q. Now you negotiated through the month of January with the union committee—January, 1939, did you not? A. Yes.

Q. And did you come to a point where you settled on the terms of a final agreement, or was there some inter-

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ruption? A. Well, I would like to give you the sequence of events as I remember them.

Q. All right. Tell us what happened following the negotiations as you recall them? A. As I recall them, we started negotiations in December of 1938, had many meetings and I believe at one time met at the State Mediation Board before Mr. Max Meyer. Mr. Max Meyer attempted to mediate the situation and I believe either on the last day in January this union called a strike—

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Q. You mean this union, Local 32-B? A. Local 32-B called a strike against the buildings in these agreements. As a result we were haled down by the Mayor of the City to Borough President Isaacs' office, and my recollection is that Borough President Isaacs also tried to act as a mediator and that there were no tangible results of that attempted mediation, and that later the same day we were called to a meeting in the room of the Committee of the Whole in City Hall, by the Mayor.

Q. What date was this, as you recall it? A. As I recall it was on February 2, 1939.

Q. And there was a strike in progress then? A. A strike in progress then. In the evening the Mayor addressed us in his characteristic fashion—

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Q. Before you tell us that, who was present before the Mayor? A. The union negotiating committee, the employers' negotiating committee and counsel for both.

Q. Was Mr. Sullivan there? A. He was.

Q. Mr. Bambrick? A. He was.

Q. Mr. Maguire? A. He was.

Q. Mr. Shortman? A. I believe so.

Q. And Mr. Young? A. I believe so.

Q. Tell us what happened at that meeting. A. The Mayor came in and told us that he had very little time to give us, that he had to be on the radio at a certain time but that he was not going to see the vertical transportation of the City stopped, and he wanted the strike

stopped. He wanted the men to go back to work and he had decided that he was going to settle the controversy and he had decided that these employees for the first 18 months of a new agreement were to receive a dollar increase and that the hours were to be reduced one hour, from 48 to 47, and that that was the best proposition that he had to offer and both sides had better accept it or else. The employers group immediately accepted, and as I remember it the union group said that they would have to place the matter before their membership for approval before they could give an answer.

Q. As you fix this, this was February 2 or 3, 1939?

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A. That is correct.

Q. And the Mayor's proposal, as I understand it—and you correct me if I do not state it correctly—was that you give all these building service men in the garment area under the contracts we are talking about a dollar increase; is that correct? A. That is correct.

Q. Was that an increase in the minimum or an over-all increase in all wages as they were then being paid? A. An over-all increase.

Q. To all men? A. To all men.

Q. And he proposed a 47-hour week? A. For the first 18 months of the contract.

Q. And that was a reduction of one hour, from 48 to 47? A. That is correct.

Q. And what did he propose as to the length of the contract? A. I believe that he said that there should be a 3-year contract.

Q. That is, running from February 1939 to February 1942? A. Correct.

Q. Now he proposed a reduction in the hours to 47 for the first 18 months of the 3-year contract. What did he propose with respect to the last 18 months? A. I am not sure that he proposed a reduction of one hour further to 46 or whether that was the result of other points

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being later discussed before Mr. McGrady. I am not certain as to that.

Q. Did the union eventually accept the Mayor's proposal? A. It did.

Q. Incidentally, the Mayor of New York is a former Congressman of the United States, isn't he? A. He is.

Q. And he is also a distinguished lawyer, is he not? A. Yes.

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Mr. Herwitz: I suppose this is relevant. I do not see it but I am a little dubious about these things.

Mr. Bruce: Well, I think it is rather material that an experienced member of Congress whose name is attached to an outstanding labor legislation, fully cognizant of the conditions in his own city, directed these parties to a 47-hour week for a three-year period from 1939 to 1942 at the time when the Federal Wage and Hour Law was on the books. It certainly is one man's opinion as to whether or not the Federal Wage and Hour Law applied to this situation.

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The Court: I should not think it is material but as I said before I will not exclude it. I do not know just what you have in mind.

Mr. Bruce: Well, the fact is that I think there isn't any doubt about these questions of fact. I mean we ought not to have to prove them. The union ought to admit that.

Mr. Herwitz: I would suggest that you take the stand, Mr. Bruce, and testify.

Mr. Bruce: Lawyers don't make very good witnesses.

Mr. Herwitz: Well, you do not make any better witness off the stand.

Mr. Bruce: All right, I accept the criticism.

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Q. The union accepted the Mayor's proposal, then?  
A. It did.

Q. And that acceptance by both the union and the employers was an acceptance, then, of the wages and hours and length, or rather duration of the new contract, was it not? A. It was.

Q. Did it leave any points open for further discussion?  
A. It did. There were many minor points to be decided.

Q. And what medium or method was to be followed under the Mayor's suggestion or proposal for settlement of those other controversies? A. My recollection is that he appointed Edward F. McGrady as an arbitrator to hear discussion on all points undecided and to render an award.

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Q. Who, if you know, and what position did Mr. McGrady hold, Mr. Edward F. McGrady, in February 1939?  
A. I believe he was Labor Relations Adviser to the Radio Corporation of America.

Q. And did you meet with Mr. McGrady to settle these so-called points of difference? A. We did.

Q. When and where did you meet with him, do you recall? A. Yes. We met in the month of February, 1939, in Mr. McGrady's office in Rockefeller Center.

Q. Was your negotiating committee all present? A. They were.

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Q. And how about the union committee? A. The union committee was also present.

Q. Mr. Bambrick? A. Mr. Bambrick.

Q. Mr. Sullivan? A. Mr. Sullivan.

Q. Mr. Maguire? A. Mr. Maguire.

Q. And other men? A. And other men.

Q. Just tell us briefly, without any elaboration, what the procedure was before Mr. McGrady and what happened, what followed that procedure? A. Well, the various points of the old contract were discussed with a view toward changes in the new contract, the working conditions,



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the provisions for reopening for discussion of wages and hours under the new contract to be written, provisions for a renewal of the contract on its expiration and practically all of the clauses that were to go into the contract.

Q. Was there any discussion of that State Wage and Hour Law before him? A. I believe there was.

Q. Mr. McGrady rendered an award settling these points of difference, did he not? A. He did.

293 Q. I show you this document and ask you whether that is a duplicate original of the so-called McGrady award (handing to witness)? A. It is.

Mr. Bruce: I offer it in evidence, your Honor.

Mr. Herwitz: No objection except those that I have previously made to this entire line.

The Court: What is the date of that, Mr. Bruce?

Mr. Bruce: The date of this award is February 21, 1939.

(Marked Defendants' Exhibit F.)

294 Mr. Bruce: Now, your Honor, I know it is bad practice to read very much from exhibits but I permitted Mr. Herwitz to read a little bit yesterday and I want to read one paragraph to develop the sequence.

The Court: I would like to have you read it so that I can follow it.

Mr. Bruce: This is in the form of an arbitration award. It refers to the strike and so on and says:

"the parties involved accepting the proposal of the Honorable Fiorello H. La Guardia, Mayor of the City of New York, which is as follows:

"An immediate increase of \$1 in the weekly wage and a reduction of hours to forty-seven (47) per week and a further reduction of hours at the end of eighteen (18) months to forty-six (46) per



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week, at which time there will also be a reopening (of the three-year contract) as to wages. All other points of difference are to be immediately settled by Arbitrator Edward F. McGrady.

"The parties having conferred with me and discussed such 'all other points of difference,' having arrived at an understanding on some of them, and thereafter having had submitted to me a written statement agreed to by the respective counsel as to what points of difference between the parties still remain undisposed of;

"Now, I, as such arbitrator, pursuant to the Mayor's proposal"—

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and I am going to omit a few words—

"do rule and decide as follows"—

now this is what I want to call your attention to particularly. This is "Point of Difference 'A'":

"The last paragraph of Provision '2.'"

"The last paragraph of Provision '2' as submitted to me would have read:

"If during the period hereof, by any law, the hours of employment are reduced below the hours provided for herein, then this agreement shall be deemed to be and be amended to provide that hours of employment hereof, including relief periods, shall be as prescribed by such law or laws without any diminution of wage rates."

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"The parties differ as to the necessity for this paragraph. This point of difference involves a situation which may never arise during the life of the agreement and it is therefore wholly unnecessary to decide the issue at this time. Accordingly, I rule that the paragraph be made to read:

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"In the event that legislation is enacted applicable to the employees in this industry requiring a reduction of hours below those provided for in this agreement, thereupon the question of whether or not such reduction of hours shall apply to and become part of this agreement shall be left to the decision of Edward F. McGrady," and so on.

Q. Now, that was February 21, 1939, was it not, Mr. Brown? A. It was.

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Q. Following Mr. McGrady's award did your negotiating committees settle upon the terms of the so-called McGrady Agreement, which is Plaintiff's Exhibit 3 in this case? A. Yes.

Q. That is, did you execute an agreement called the McGrady Agreement? A. We did.

Q. And did you incorporate in that agreement both the Mayor's proposal as set forth in the McGrady award, Defendants' Exhibit F, and also Mr. McGrady's decision on the points of difference? A. We did.

Q. And did you include that paragraph which I have just read into the record in this contract? A. We did.

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Q. I show you Plaintiff's Exhibit 3 and ask you whether that paragraph is the one contained at the end of paragraph numbered 2 of the McGrady contract (handing to witness)? A. It is.

Mr. Bruce: At this time, your Honor, I would like to offer in evidence certain pages of the official magazine of the union which Mr. Greenberg testified about yesterday, called "Building Service" for February, 1939. It is identified because it has a picture of Mr. Edward F. McGrady on the face of it and says that he makes an arbitration award. I specifically want to offer in evidence page 3 of that document which is entitled "The President's Page," and signed in facsimile by

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James J. Bambrick, President, with a picture of Mr. Bambrick here (indicating).

Then I want to offer in evidence from that same publication page 12, the right-hand column of page 13. That is the third column on the right-hand side. The other two columns are all showing what a good basketball team and bowling team Local 32-B has here.

Mr. Herwitz: Just as relevant as the other stuff.

Mr. Bruce: Well, you may be bowled over by this case before you get through.

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So I want page 3, the right-hand column of page 13 and the bottom of page 15 and the right-hand column of page 16. The pages referred to from 12 through 16 are entitled "Arbitrator McGrady Makes Supplementary Award." It purports to be a summary of the McGrady award signed by Thomas Young, recording secretary, explaining the various terms of the award.

Mr. Herwitz: I object to this introduction at this time on the ground that the manner in which it is sought to be introduced is improper. No proper foundation has been laid for its introduction. I do not know what this witness has to do with the union magazine and I do not think it should be offered in this informal fashion; in line, of course, with my other objection.

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Mr. Bruce: I am trying to be a little logical here. We have just had the McGrady award, and I want the union's explanation of that award, which your Honor will see upon reading this offer is quite material to the issues of this case. There is no question about the competency of this document. There are no objections made to that. I admit that I am offering it a little bit informally

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but I am offering it certainly in a logical position because I am trying to make this read like a developing story.

Mr. Herwitz: I object to that on the ground that it is incompetent.

The Court: You have not shown that it is published by the union.

Mr. Bruce: I have not shown that this particular issue was published. I have shown through Mr. Greenberg yesterday that the official magazine of this union—

305 The Court: I should not think we need to take time to discuss it.

Mr. Bruce: I should not think so either. Mr. Sullivan is here and Mr. Sullivan, I think, is one of the editors of this magazine. This is a very technical objection now.

The Court: If it was published by the union I think it will be conceded rather than calling witnesses from the union to prove it.

Mr. Herwitz: I am not denying that this announcement was published by the union, but I certainly—

306 The Court: You said it was incompetent.

Mr. Herwitz: But I certainly believe that any statements printed in a union magazine, without calling the authors of them, is incompetent. If they want to call him he is available, or I can call him subsequently but not with this witness on the stand.

Mr. Bruce: I understand that this is out of order, but I am trying to make this story unfold chronologically, both for your benefit and for the Court's benefit as well as for my own. I could ask Mr. Brown to leave the stand and call Mr. Young who signed this article. I have tried to

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subpoena Mr. Bambrick, who signed the other one, but I hadn't supposed that this union would deny that this was its publication.

Mr. Herwitz: No, the union has not denied that.

Mr. Bruce: Well, your objection is to its materiality and relevancy. We do not understand that.

The Court: You do not object to its competency?

Mr. Herwitz: I object to the contents contained in the magazine, whether it is the official publication of the union or not.

The Court: If I understand your objection it is not that it is incompetent; that is, that it is not properly proved but you object to it on the ground that the contents of the article are immaterial?

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Mr. Herwitz: If your Honor please, I object to any statement being put in this record made by James J. Bambrick, who is not a witness at this trial. I do not deny that this magazine which I hold in my hand may be a publication put out by the union, but I say—

The Court: I think you are right.

Mr. Bruce: Right as to what?

The Court: I think he is right. Here is an article in a magazine. There is nothing to show that that binds the union. I suppose many a magazine has articles in it which do not reflect the views, perhaps, of the owner of the magazine, or in this case the union. It may take it so that both sides may be before the public.

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Mr. Bruce: Your Honor, there is testimony in this case that this publication is the official magazine of the union. It was testified to by Mr. Greenberg that Mr. Bambrick was the president of the union during this period and that Mr. Thomas Young was the secretary. It seems to me that a question of the intentions of the parties with re-

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spect to the applicability of a statute, such as the Wage and Hour Law, that the statements made by officers of the union in the official magazine of the union, which is read by the union—and you will recall that Mr. Greenberg, the plaintiff in this case, said that although he may not have read every issue he ordinarily got them—I think I am quoting him correctly—and it seems to me that those statements are highly material on the question of the intention of parties. We haven't a jury here. There is no possibility of your being misled by the weight of these things. They may not have a great deal of weight with you but they do show you, I think, the atmosphere in which this McGrady Agreement was negotiated. Now Mr. Herwitz, as I have remarked before, offered the McGrady Agreement without reservation as part of his case, and here is an officer of the union explaining the McGrady Agreement—

Mr. Herwitz: A former officer, Mr. Bruce.

Mr. Bruce: Well, but an officer at the time. I am not talking about Mr. Bambrick at the time. I am talking about Mr. Young now.

312 The Court: Why don't you call Mr. Young and ask him if he wrote the article?

Mr. Bruce: All right.

Mr. Brown, will you step down, please.

(Witness temporarily excused.)

Mr. Bruce: I prefer to develop this case in a logical way instead of piecemealing it out.

The Court: Yes.

Mr. Bruce: Mr. Young, please.



*Defendants' Witness, Thomas G. Young, Direct*

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THOMAS G. YOUNG, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

*Direct Examination by Mr. Bruce:*

Mr. Bruce: Will you mark this for identification so that we can have all the discussion relating itself to that magazine "Building Service" for the month of February, 1939.

(Marked Defendants' Exhibit G for identification.)

Mr. Bruce: May the record show, your Honor, that the preceding discussion has related to Defendants' Exhibit G for identification.

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The Court: Yes. I think that appears in the record now.

Mr. Bruce: I think so.

Q. Mr. Young, you were recording secretary of Local 32-B, Building Service Union, in December, 1938, and January and February, 1939, were you not? A. I was.

Q. And as such you were a member of the negotiating committee of the union? A. I was.

Q. And you attended, did you not, many of the meetings at which the renewal of the so-called Extended Mahoney Agreement was discussed? A. In the preliminary meetings, yes.

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Q. The preliminary meetings leading up to what is known as the McGrady Agreement? A. That is right.

Q. Did you appear before Mr. McGrady? A. No, I was not present.

Q. Did you read the McGrady award at that time? A. I read it after the award was signed and put in the magazine for publication.

Q. Do you recall that you wrote for the magazine "Building Service" for February, 1939, an article entitled "Arbitrator McGrady Makes Supplementary Award," and that you signed that as recording secretary? A. May I look at it?

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*Defendants' Witness, Thomas G. Young, Direct*

Q. Yes. Refresh your recollection with Defendants' Exhibit G for identification (handing to witness). It begins on page 12, Mr. Young, and continues over. A. (After examining) ~~No~~, unfortunately I am not the author of this article.

Q. Who was the author of that, Mr. Young? A. I think Mr. Bambrick was responsible for this particular article under my name here.

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Q. You signed the article, did you not? A. No, I did not. The name was just printed in there, "Thomas Young, Recording Secretary." But I am not the author of the contents of this article.

Q. Was it signed without your authorization? A. Well, it was in this particular case, but the fact that Mr. Bambrick was acquainted with the McGrady award and he hadn't sufficient space in his page or on his page, rather, he utilized my page for that month, for that purpose.

Q. Oh, you ordinarily had a page in this magazine as recording secretary? A. Yes. I write my own articles on that particular page.

Q. But this article you did not write? A. No, I did not.

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Q. Did you object to Mr. Bambrick signing it for you? A. Well, as a matter of fact he did not consult me when he wrote that article, but as part of the union's business I thought it would be all right even if he had showed it to me.

Q. Well, when you saw it over your signature did you object? A. No, I did not raise any objections at the time.

Q. You read the McGrady award, did you not? A. Well, frankly, I did not read it through. I just read the highlights pertaining to the wages and the hours and the vacations and the items of that nature.

The Court: Was Mr. Bambrick the one who wrote the article?

The Witness: Yes, your Honor.

*Defendants' Witness, Thomas G. Young, Direct*

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Q. What was Mr. Bambrick at that time? A. He was president of the union at that time.

Q. On page 3 of this Defendants' Exhibit G for identification appears a picture. Is that the picture of Mr. Bambrick? A. That is Mr. Bambrick, that is his picture.

Q. And is that a facsimile of his signature? A. It is.

Q. And he was a member of the negotiating committee that negotiated the McGrady Agreement, was he not? A. He was.

Q. This magazine is and has been the official publication of the union since about 1934, is that correct? A. Yes, about that time.

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Q. And does this go to all members of the union who pay their dues? A. Practically all those who are on our mailing list. Of course it is such a large membership that you cannot very well get a copy to each member, but the majority of the members receive it each month.

Q. And would it ordinarily have been mailed in the period of 1938-1939 to substantially all your membership in good standing? A. That is correct.

Q. And how many members in good standing did you have at that time? A. It is difficult to recall.

Q. Well, just estimate it. A. In 1939 I would say we had about twelve to fifteen thousand members.

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Q. You glanced over that article about the McGrady award that appeared over your signature. Is there anything in there that appears as an incorrect characterization of the McGrady award?

Mr. Herwitz: I object to that, your Honor, on the ground that the McGrady award is in evidence and anybody's characterization of it would be just that characterization which could not be relevant or material.

The Court: I suppose the characterization by this witness is not material but you might ask him whether the statements in it are true.

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*Defendants' Witness, Thomas G. Young, Direct*

Q. Are the statements in that article about the McGrady award, which appears over your signature, true to the best of your recollection and knowledge?

Mr. Herwitz: Well, if I may at this time say this, your Honor, I don't like to butt in—

Mr. Bruce: Why do you?

Mr. Herwitz: Well, I feel that I must protect Mr. Greenberg just as you feel you must protect these thousands of real estate owners in New York City.

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This article which is contained in the exhibit for identification is merely a repetition of the McGrady agreement with the writer's summary of that opinion. I cannot see what that can possibly add or detract from the defendants' case. I cannot see why this witness should be asked, when he says he has merely read parts of the McGrady award, to give us his opinion as to whether the statements contained in that article are true. I object to the introduction—

Mr. Bruce: Your Honor, I withdraw the last question and I offer the document in evidence.

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Mr. Herwitz: I object to the introduction of the document in evidence. I think the vice of it has been clearly shown by the fact that the witness, who purports to have written it, if you just read the magazine cold on cross examination or even on direct examination, it appears that he did not write it. My main objection at this point is that the introduction of the article without the author being on the stand and without my having an opportunity to cross examine and determine the basis for the statements, and thus test the truth and correctness of the statements appearing therein, which seems an elementary principle of evidence, and I am certainly entitled to cross examine for

the purpose of testing the truth. If they want to call Mr. Bambrick—

Mr. Bruce: The defendants have offered the pages referred to earlier in the record, contained in Defendants' Exhibit G for identification. I have offered them now, and Mr. Herwitz has objected. I am not quite clear on what ground yet except as to materiality and relevancy. That I understand. I do not know whether he still presses his objection as to competency.

Mr. Herwitz: I certainly do, your Honor.

The Court: Why is it incompetent? This witness has stated that it was the official magazine of the union and that Mr. Bambrick wrote the article. I should think that the objection that it is incompetent, so far as that is concerned—well it is cured.

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Mr. Herwitz: Could I ask him a couple of questions on the voir dire to determine whether or not he knows that Mr. Bambrick wrote the article?

The Court: He stated that.

Mr. Bruce: He so stated.

The Court: I think you had better reserve that for cross examination.

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Mr. Herwitz: But then the vice will have been cured; the thing will be in evidence.

The Court: Well, mark it—it is marked for identification, isn't it?

Mr. Bruce: It is marked for identification and it is now offered. Mr. Herwitz fears the article for some reason. I hadn't supposed it was so strong, but not so strong as you make it.

The Court: I think I might as well dispose of this question and receive it in evidence.

Mr. Herwitz: Exception.

(Defendants' Exhibit G for identification received in evidence.)

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*Defendants' Witness, Thomas G. Young, Cross*

Mr. Bruce: All right, Mr. Young. That is all, thank you.

The Court: Subject to your general objections, Mr. Herwitz.

Mr. Herwitz: And specifically to the failure to competently establish it, to lay a proper foundation.

The Court: Yes. You may examine this witness.

Mr. Herwitz: Right now!

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The Court: Certainly.

*Cross Examination by Mr. Herwitz:*

Q. Mr. Young, you told us that this article appearing in the "Building Service" for February, 1939, which has your name appended to it, was not written by yourself; is that correct? A. It was not.

Q. Do you actually know who wrote it? A. I do not.

Q. Do you actually know whether or not it was written by the president of Local 32B at that time, James J. Bambrick? A. I couldn't say.

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Q. You say you were not present at any of the hearings before Mr. McGrady? A. I was not.

Q. And you have only read parts of the McGrady Agreement? A. Just parts of it.

Q. Do you know whether Mr. Bambrick, before writing this article, submitted it to the Executive Board for its approval? A. To the best of my knowledge it was not submitted.

Q. Do you know whether the opinions of the president of Local 32-B were always the majority opinion of the executive board of the union? A. No, not always.

Q. Does the president of Local 32-B have a vote in the executive board of Local 32-B? A. One vote.



*Defendants' Witness, Thomas G. Young, Cross*

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Q. Does he have that vote only in the event of a tie?  
A. That is true.

Q. Otherwise he has no vote? A. Quite right.

Q. And is the executive board of Local 32-B more or less a legislative body of the union? A. It is.

Q. And were the opinions of Bambrick as contained in this article, if it was written by Bambrick, submitted to either the executive board or to the membership for its opinion? A. No.

Mr. Bruce: I object to the speculation "if it was written by Mr. Bambrick." I mean I object to the form of the question. I think you can re-frame it. 332

Q. The opinions expressed in this article, no matter by whom written, were not submitted to the membership, were they? A. They were not.

Q. Were you frequently in disagreement with Mr. Bambrick as to some of his opinions on union business? A. Oh, yes, of course.

Q. And were you in disagreement with Mr. Bambrick as to his attitude in connection with these particular negotiations which resulted in the McGrady Agreement? A. I was. 333

Q. Were you present at a union meeting that was called to consider the Mayor's proposal? A. I was present.

Q. And will you tell this Court whether or not the members of the union who were present at that meeting voiced their sentiments with regard to the Mayor's proposal? A. They certainly did. They opposed it.

Mr. Bruce: Your Honor, I haven't examined this witness at all on this question of the Mayor's proposal. I think if you want to make him your own witness at this time as part of your case, I won't object to it. You are asking him about this

334 *Defendants' Witness, Thomas G. Young, Re-direct*

magazine. I did not refer to the Mayor's proposal in this examination.

The Court: This witness was turned over to you, Mr. Herwitz, so that you might inquire about the publication of this article, who wrote it.

335 Mr. Herwitz: I will abide by your Honor's decision but I thought in view of the fact that these articles which are now in evidence purport to go into the benefits derived from the McGrady Agreement, and these articles purport to indicate that it is the expression of the union's opinion, and in view of the fact that I have no opportunity to cross-examine the purported author of these articles as to whether or not he really was speaking for the union when he wrote them, I thought I would at this time examine Mr. Young relative thereto. However if your Honor feels that I should not do it at this time I will be glad to withdraw it.

The Court: I think it would be better, don't you?

Mr. Herwitz: Yes. I think we ought to—

The Court: Reserve that feature of the magazine until later.

336 Mr. Herwitz: Then I shall withdraw my question to Mr. Young at this time, but I submit to your Honor that I should have the opportunity not to examine Mr. Young but to cross examine Mr. Young relative to these articles that have been introduced; that I do not think for that purpose he becomes my witness.

That is all.

*Re-direct Examination by Mr. Bruce:*

Q. Just one other question I want to ask you, Mr. Young. You were an editor of this magazine, were you not, at that time? A. Yes, sir.

*Defendants' Witness, Thomas G. Young, Re-direct*

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Q. Who were the other editors of this magazine, if you recall? A. Mr. Bambrick, Mr. Hareckham and Mr. Sullivan.

Q. The editors were Mr. Bambrick, who was then president; Mr. Hareckham, who was vice-president; Mr. Sullivan who was then treasurer and is now president of the union? A. That is correct.

Q. And yourself? A. That is correct.

Q. Ordinarily the editors of this magazine determine the contents of the publication, do they not? A. Ordinarily, yes.

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Mr. Bruce: That is all.

Mr. Herwitz: If your Honor please, I do not want to continue the cross examination of this witness, but in the light of these other questions I think the door has been opened now.

The Court: I should think so. It is only a question of when you put another witness on the stand. This witness was called merely for the special purpose, called out of order.

Mr. Herwitz: Well, I will not press my cross-examination of him now—

The Court: How long will it take?

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Mr. Herwitz: It might take an extended period, your Honor. I would like also, just so that I am sure my record is preserved, to move to strike out the testimony of this witness given so far and also to have the exhibit which has been introduced withdrawn.

Mr. Bruce: Are you through now?

Mr. Herwitz: Yes.

Mr. Bruce: All right, Mr. Young; we are through with you.

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*Defendants' Witness, Melvin Brown, Direct*

MELVIN BROWN, resumed the stand:

*Direct Examination continued by Mr. Bruce:*

Mr. Bruce: Before I continue with Mr. Brown, I just want to read three parts from Defendants' Exhibit G: I am now reading from page 3, which is the article signed by Mr. Bambrick on the so-called president's page of this publication.

Mr. Herwitz: I think that the statement should be put "the article purporting to be signed by Mr. Bambrick."

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Mr. Bruce: I do not think the Court will be fooled by my language—"purporting to be signed," then.

"In the event of any wage or hour law the union is protected by carrying the matter before the Honorable Edward F. McGrady at any time the question arises"—

this being February, 1939.

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Now I am reading from page 13 in the article entitled "Arbitrator McGrady Makes Supplementary Award," which appeared over the signature of Mr. Young. This is paragraph 12 entitled, "Wage and Hour Legislation."

"As a protection for the union, in the event of any wage and hour legislation the union is permitted, according to the terms of the contract, to present the entire question to Mr. McGrady if and when such wage and hour legislation ever applies to the building service industry."

Q. Mr. Brown, who selected the name "Building Service Employees" as descriptive of elevator men and porters and maintenance men in this industry, if you know?

Mr. Herwitz: I object.

*Defendants' Witness, Melvin Brown, Direct*

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Q. If you know. A. Who selected the name?

Mr. Herwitz: Of Building Service Employees?

The Court: What difference does it make?

Mr. Bruce: Your Honor, I think it shows—

The Court: Well, go ahead and answer it. It is quicker than to discuss it.

Mr. Bruce: This is the only question I am going to ask on this point. I will argue the relevancy of it.

The Court: All right, go ahead.

A. Well, I do not quite understand your question, Mr. Bruce. Do you mean that this is with relation to the name of the union or the characterization of the employees as such?

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Q. The characterization of the employees. A. Why, I believe at least ever since I have been in the industry they have been known as building service employees.

Q. That is, among real estate men? A. Among real estate managing agents and owners.

Q. Known as service employees? A. Very definitely.

Q. And when the union was organized in this industry in 1934 they selected the name, did they not, the Building Service Employees International Union or Local Union?

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Mr. Herwitz: I think that that certainly is objectionable as to relevancy, materiality and competency—

Mr. Bruce: I will withdraw the question, because I think it is so obvious that I shouldn't even ask it.

Q. Prior to June 1, 1942, Mr. Brown, had the building service industry ever regarded building service employees as being engaged in production?

Mr. Herwitz: I object to that, your Honor.

The Court: Objection sustained.

Mr. Bruce: Exception.

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*Defendants' Witness, Melvin Brown, Direct*

The Court: You asked if they were engaged in production.

Mr. Bruce: In production, whether in the industry generally—and he is speaking from 16 years of experience—building service employees were ever regarded as having been engaged in production prior to June 1, 1942.

The Court: Yes. I think the objection should be sustained.

Mr. Bruce: I take an exception.

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Q. Did the wages and hours provided in the McGrady Agreement, Mr. Brown, stand for a full period of three years or were there some changes pursuant to the so-called revision clauses of that contract? A. There was a reopening and a revision.

Q. And that reopening was before Mr. Wolff, was it not, and led to the so-called Wolff award? A. That is correct.

Q. And that is the Wolff award made in October, 1940, Defendants' Exhibit C, is it not (handing to witness)? A. It is.

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Q. What effect did the Wolff award have on the wages of building service employees under these contracts, briefly? A. It provided for increases in classifications A, B and C for the remaining 18 months of the contract.

Q. Did it raise both the minimums and those wages that were above the minimums? A. Yes.

Q. It did not change the hours, did it? A. No. The hours were provided for in the contract itself.

Q. And they remained at 46 hours until the expiration of the McGrady Agreement in February, 1942? A. That is correct.

Q. Near the end of the McGrady Agreement did your respective committees of the employers' associations and the union commence negotiations for a new contract? A. They did.



Q. And when did those negotiations commence, do you recall? A. I believe in the early part of December, 1941.

Mr. Herwitz: I naturally have my objection recorded to this testimony on negotiations taking place in 1942.

Mr. Bruce: No, this is December, 1941.

Mr. Herwitz: Or December, 1941.

Mr. Bruce: This covers the period—

Mr. Herwitz: I mean December, 1941, relative to February, 1942. As I understand the intention of the defendants in introducing this testimony it is to use—

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Mr. Bruce: I think you might wait until I ask the question.

Mr. Herwitz: Well, I would like to make the Court understand the reason why I think it is entirely irrelevant, incompetent and immaterial.

Mr. Bruce: I think the Court understands your objection already. The objection isn't any different than it has been for two days.

Mr. Herwitz: This is in addition to the other objection that I have made, on the basis of its being much too remote, from an evidentiary point of view, to possibly be persuasive of what the intent of the parties was. Three years prior to the time he is now testifying.

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Mr. Bruce: You do not even know that that is my purpose.

Mr. Hertwitz: In case it is.

The Court: The objection is noted.

Mr. Bruce: What was the last question and answer, Mr. Stenographer?

(Record read.)

Q. And where did you meet this time on these negotiations? A. At the State Mediation Board.

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*Defendants' Witness, Melvin Brown, Direct*

Q. Which is located where? A. 250 West 57th Street.

Q. And who represented the union in those negotiations? A. Mr. Sullivan, Mr. Harckham.

Q. In what capacity was Mr. Sullivan then? A. Mr. Sullivan was president of the union at that time.

Q. President? A. Yes. Mr. Harckham, Mr. Shortman, I believe Mr. Young, and their counsel.

Q. And who was their counsel? A. I believe Mr. Sidney Cohen of Mr. Boudin's office.

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Q. During those negotiations your associations were represented by what committee before Mr. Meyer? A. Mr. Spear, Mr. Meyer and myself.

Q. That Mr. Meyer was not the Mr. Max Meyer you referred to earlier, but Mr. Arthur Meyer? A. Mr. Arthur Meyer, Chairman of the State Mediation Board.

Q. Was there any discussion of the duration of a new contract to succeed the McGrady contract? A. There was.

Q. What was the discussion thereof? A. I believe the employers asked for a three-year contract, and my recollection is that the union had no objection.

Q. Was there any discussion of the Federal Wage and Hour Law? A. Not in the early negotiations.

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Q. When, if you recall, was there discussion of the Federal Wage and Hour Law later in those negotiations before Mr. Meyer? A. My recollection is that we had a meeting on December 30th before Mr. Meyer and that there was an adjournment until January 5th. Up to that point—

Q. Just a minute, Mr. Brown. What were the principal issues for discussion before Mr. Meyer? A. Wages and hours.

Q. Those are usually the issues in these negotiations? A. Yes.

Q. Well, you adjourned to January 5th? A. Right.

Q. January 5th, 1942? A. Right.

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Q. What happened on that day, if you recall? A. We appeared at the office of Mr. Meyer in the State Mediation Board's offices, and both sides were in a considerable state of confusion. We told Mr. Meyer—

Mr. Herwitz: I move to strike out the characterization.

The Court: Strike it out.

A. (Continuing) We told Mr. Meyer that due to the decision of the Circuit Court of Appeals on the 30th or 31st of December, 1941, reversing Judge Woolsey's decision and holding that the building service employees were covered by the Act, threw a bombshell into our negotiations and we did not know where to go from there in these negotiations.

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Q. This was January 5, 1942? A. Right.

Q. And the Circuit Court's opinion, I think, was handed down about December 30, 1941, was it not? A. Right.

Q. In the case of Fleming v. Arsenal? A. That is right.

Q. Reversing Judge Woolsey? A. Yes.

Q. Well, what did the union representatives say, if anything, about these so-called bombshells? A. Well, Mr. Sullivan was in the room in Mr. Meyer's office and Mr. Sullivan was all smiles and he said, "This is more of a surprise to us than it is to you."

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Mr. Herwitz: I move to strike out the statement on the ground that it was not at all binding upon the plaintiff Meyer Greenberg, had no relation to the issues in this case and entirely too remote.

The Court: Who said that?

The Witness: Mr. Sullivan, president of the union.

Mr. Herwitz: After the time covered by this agreement—is that correct?

Q. What was the day when that statement was made? A. January 5, 1942.

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*Defendants' Witness, Melvin Brown, Direct*

Mr. Herwitz: January 5th.

The Court: I do not know whether that has any significance or not, but I will have it in.

Mr. Bruce: Well, it does have this significance, your Honor—

The Court: Why discuss it when I have ruled.

Mr. Bruce: Yes.

Q. Did anybody else make any comments about the decision that you recall? A. Well, we were all pretty well stirred up about it and I believe that all of us probably expressed some surprise and at least from our side at this point.

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Mr. Herwitz: I move to strike from the record the witness's characterization of the expressions of surprise by the various parties and their state of mind.

The Court: Yes, strike it out.

Q. Well, what happened after the meeting of January 5th? Did you continue your discussions of a contract to succeed the McGrady contract? A. We did but we told Mr. Meyer that we would not enter into any contract providing for any increase in the wages of these workers without some protection in that contract against the operation in the future of the Wages and Hours Act.

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Q. Did you reach an agreement on wages and hours and other working conditions before Mr. Meyer eventually, and sign an agreement? A. No. I believe that Mr. Meyer rendered an award as arbitrator. We had previously been before him and he acted as mediator. When it came to the final determination of wages and hours I believe that he rendered an arbitration award.

Q. But didn't you agree or didn't you incorporate the terms of that award in your eventual agreement with the union? A. Yes, we did.

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Q. Did that agreement follow the usual pattern of the other agreements in fixing wages on a weekly basis for a specific number of hours? A. No, it did not. It followed an entirely new pattern as a result of this decision.

Q. And what was that pattern? A. The pattern was the fixing of an hourly rate and the inclusion in the contract of a formula—

Mr. Herwitz: Wait a second, if you don't mind. I think the Meyer Agreement is in evidence, is it not?

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Mr. Bruce: The Meyer Agreement was apparently marked for identification. I will offer it in evidence now, your Honor. It has been marked Defendants' Exhibit D for identification. I will offer that in evidence now.

Mr. Herwitz: I object to it on the grounds previously stated.

The Court: I think I will receive it.

(Defendants' Exhibit D for identification received in evidence.)

Mr. Herwitz: Now, I object to the question addressed to the witness relative to it.

Mr. Bruce: I withdraw that last question.

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Q. Isn't it a fact, Mr. Brown, that the union agreed to that hourly rate formula? A. Very definitely.

Mr. Herwitz: I will object to that on the ground that we have the agreement in evidence.

The Court: The objection is sustained. I suppose you move to strike it out?

Mr. Herwitz: I move to strike it out.

The Court: Yes.

Q. Was there any discussion of this hourly rate formula that you refer to, as being incorporated in the

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*Defendants' Witness, Melvin Brown, Direct*

Meyer Agreement prior to the signing of that agreement? A. There was.

Mr. Herwitz: I am objecting to parol evidence of discussions relating to a contract which was later entered into and which is in evidence.

The Court: I think that question is all right. Was there discussion?

The Witness: There was considerable discussion.

Q. And what was that discussion—

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Mr. Herwitz: I object to that.

Q. Will you tell the Court what the discussion was by both the union negotiators and the employers' negotiators with respect to the hourly formula set relating to the Wage and Hour Law?

Mr. Herwitz: I object to that, your Honor.

The Court: That is possibly a borderline question. I think I shall receive it because as I said there is no jury here and when I go over the entire record, when the case is fully presented, I probably will see a little more clearly than I do now.

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Mr. Herwitz: Exception.

The Court: Yes.

A. The employers—

The Court: Because there is something in the record it does not necessarily follow that I shall consider it when I come to decide the case. I might find that it had no bearing on the question.

Mr. Herwitz: Yes, your Honor.

The Court: But I repeat again, I think it is very much better in a case like this to take too much testimony than too little. It is quite apparent that both of you have prepared your cases with



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consummate care and are not making an objection to questions unless you believe that it is warranted.

So I think I will be rather liberal.

Mr. Herwitz: I understand quite well, your Honor.

A. As I understand, the last question was the nature of the discussions?

Mr. Bruce: Will you read the question, Mr. Stenographer, please?

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Q. (Read.) A. Counsel for the employers proposed the formula which appeared in the contract, and discussion was had with both sides in the presence of Mr. Meyer, and one of the questions raised in the discussion was whether the Wages and Hours Division of the Government would accept such a formula, and the parties agreed to consult with the Wages and Hours Division, which was done at a time subsequent to this particular discussion, and at later meetings we were informed that the Wages and Hours Division had approved of this formula.

The Court: Having allowed that question I think I should have in the record, if it is not already there, and I do not think it is—who was present.

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Mr. Bruce: That question was asked but I think it should be asked again.

Q. Who was present in these negotiations leading up to the Meyer Agreement?

The Court: Are they the same persons you have told us about being present at some other meeting, or is this the meeting you have been telling us about?

The Witness: These negotiations, your Honor, extended over quite a period of time.

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The Court: That is what I thought. And probably this was another meeting, and if so you should tell us who was present.

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The Witness: Mr. Sullivan, president of the union; Mr. Harckham, Mr. Shortman, Mr. Sidney Cohen, their counsel, and I think I should explain that there were times during these negotiations where the union committee was in one room and the employers' committee in another room, and Mr. Meyer acted as mediator and visited each side, bringing proposals and counterproposals back and forth, and then at times arranged for joint meetings of the two groups, and it was during these separate meetings and joint meetings that this matter was discussed.

Mr. Herwitz: Now, I would like to move to strike out the testimony in answer to the question that was put. I would also like to move on the ground of hearsay, that is, he testified—

The Court: As it stands now you are right because it is quite possible to interpret this testimony as being statements made when the witness's own group was present and not when members of the other group were present.

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Mr. Herwitz: Yes; also, your Honor, on his statement that the Wage and Hour Administration approved. Now if that is to be admitted solely for the purpose of establishing that such a thing was discussed, that is one thing; but if it is to be introduced for the purpose of establishing the fact that the Wage and Hour Division did approve, I object to it in that regard.

The Court: You are right in that.

Q. Am I correct, Mr. Brown, that the Meyer Agreement granted in substance a 10 per cent increase in wages to all of the employees working under that agree-

ment, both those at the minimum and those above the minimum?

Mr. Herwitz: I object to that on the ground that it is leading, and the best evidence is the contract itself.

The Court: Of course, there is no getting away from that fact, Mr. Bruce.

Mr. Bruce: That is correct, your Honor, but it is an undeniable fact. The 10 per cent does not appear from the face of the contract.

The Court: I do not see why you object to it because all I have to do is refer to the contract.

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Mr. Bruce: And compute it.

The Court: The case, as I understand it, does not hinge on anything of that sort.

Mr. Herwitz: Well, you may find, your Honor, that I might disagree with that statement. I do not like to have it characterized and have it become frozen into anybody's mind before we have a chance to argue. I mean if there is going to be an argument and he is going to state arguable facts then we ought not to take testimony—

The Court: I assume that that is a fact. I would get by just reading the contract which is in evidence.

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Mr. Herwitz: It might possibly be the subject of argument, your Honor.

Mr. Bruce: It would not appear without a mathematical calculation. I will approach it from a different way.

The Court: Then I think you are right and I am wrong, Mr. Herwitz. I assumed that it was something clearly provided for in the contract.

Mr. Bruce: Well, Mr. Herwitz is not correct on that.

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*Defendants' Witness, Melvin Brown, Direct*

Q. By the Meyer Agreement did the building service employees in the garment center get a wage increase?

A. They did.

Q. Substantially how much? A. 10 per cent.

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Mr. Herwitz: Now, I would like to object to those questions and move to strike them on the ground that they are conclusions. The objection also goes to the point that I have previously raised, that whether or not by these agreements the employees got a wage increase—and that may be a point your Honor will have to decide—I think it is a critical point but I never know what importance my colleague here is going to place on some minor detail.

The Court: Well, from a technical standpoint the objection is good because the contract speaks for itself.

Mr. Bruce: Well, I think that is quite right, your Honor. I am just trying to save you and me the difficulty of making a mathematical calculation.

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Mr. Herwitz: Your Honor, I do not think you will be saved if you get a wrong impression about something that may be subject to argument. I am not trying to be technical. I think you have discovered that I am perfectly willing to go along, but I think I must interpose an objection and a real objection when I think that my clients are in jeopardy.

The Court: I haven't any reason to feel up to this time that objections have been made by anyone just for the purpose of obstruction.

Mr. Herwitz: Yes.

The Court: I do not think there has been an objection made that was not made in good faith.

Mr. Herwitz: Maybe bad judgment but good faith.

*Defendants' Witness, Melvin Brown, Direct*

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Mr. Bruce: Mr. Herwitz apparently is afraid of being barred from this before the War Labor Board when he asks for another increase but I am—

Mr. Herwitz: Mr. Herwitz is not as fearful of a great number of things that Mr. Bruce would have you believe, your Honor.

It is one o'clock. Shall we take a recess?

Mr. Bruce: May I ask two other questions?

The Court: Yes.

Q. Mr. Brown, the Meyer Agreement called for a 46- 380  
hour week, did it not? A. Yes.

Q. And set weekly wages? A. It did.

Q. And provided a formula for determining what the  
hourly rate of the employees was? A. It did.

Mr. Bruce: That is all.

The Court: Do you wish to cross examine him?

Mr. Herwitz: Yes, of course.

The Court: Then we will adjourn until two  
o'clock.

Mr. Herwitz: May I inquire, are you through  
with the witness?

Mr. Bruce: Yes, Mr. Herwitz.

Mr. Herwitz: Two o'clock, your Honor?

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The Court: Yes.

(Recess to 2:00 P. M.)



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*Defendants' Witness, Melvin Brown, Cross*

Afternoon session.

MELVIN BROWN, resumed the stand.

*Cross Examination by Mr. Herwitz:*

Q. Mr. Brown, you testified on direct examination that the union in 1938 demanded a 40-hour week, is that correct? A. That is correct.

Q. Now, that was its original demand, was it not? A. That is my recollection, yes.

383 Q. And when it demanded a 40-hour week did it also demand an increase in salary? A. It did.

Q. And was that an increase in weekly salary that it demanded in its original demands, if you know? A. I don't recall the exact terms of the demand but the usual demands were in terms of percentage and also specified what the weekly wages should be.

Q. I am not asking you about the usual demands. If you don't remember something, Mr. Brown, I am perfectly willing to have you say that you don't. A. I don't remember exactly as to 1938.

384 Q. I ask you to look at what purports to be proposals of the scale committee of Local 32-B, Building Service Employees International Union, for revisions and amendments to office and loft building contracts for the term commenced February 1, 1939, as compiled by Rice and Maguire for Local 32-B, and ask you whether that refreshes your recollection as to the demands that were made and whether those were the demands or proposals which were submitted to the association (handing to witness)? A. I believe that these are.

Mr. Herwitz: Now, if your Honor please, I have a book in my hand which does not belong to me. It belongs to Edward C. Maguire, former counsel to the union. I would like to have this document, as it has been identified, considered marked in evi-



*Defendants' Witness, Melvin Brown, Cross*

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dence and I will produce, before the conclusion of the trial, photostats.

The Court: No objection to that, is there?

Mr. Bruce: May I see it first?

Mr. Herwitz: Yes (handing to Mr. Bruce). I am not offering the book. I am just offering the demands so far.

(Discussion off the record between Mr. Herwitz and Mr. Bruce re exhibit.)

Mr. Herwitz: After conferring with defendants' counsel I have ascertained that they have what purports to be the proposals of Local 32-B actually submitted by the union to the associations. I have not examined these proposals but I am willing to concede, until shown to the contrary, that these were the proposals which were submitted, and I therefore withdraw the previous offer of the proposals as contained in the book which I had, and I offer these proposals which have been submitted to me and ask that they be considered marked in evidence. We have agreed that we will submit either a stenographic or photostatic copy thereof —is that correct, Mr. Bruce?

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Mr. Bruce: The defendants have no objection at all to these being offered in evidence, but I think that it would be simpler if Mr. Herwitz wants us to stipulate to something contained in there. It is a rather lengthy document and will burden the record. We have endeavored thus far not to burden the record. There are a great many things that are immaterial to this discussion, as you will readily concede.

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Mr. Herwitz: Well, I think the total of the union's proposals, even though it may burden the record and even though I am in sympathy with your desire not to burden it, that is as relevant to the issue as the other things which have

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*Defendants' Witness, Melvin Brown, Cross*

been introduced in the case. Of course I do not concede the relevancy of any of the testimony.

The Court: What is the date of that proposal?

Mr. Herwitz: The date of it, as it appears, is December 17, 1938.

(Deemed marked Plaintiff's Exhibit 5.)

Mr. Bruce: It is understood that the pencil notes on this document which were made in 1938 by the men when they were negotiating the contract are not being offered.

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Mr. Herwitz: No, that is correct.

Mr. Bruce: Pencil or any other notes that aren't part of the document.

Mr. Herwitz: Yes.

The Witness: Mr. Herwitz, may I see that to see whether it conforms to my recollection?

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Q. Yes (handing to witness). A. (After examining) May I say that this does not conform exactly with the other demands that were shown to me, that they are more voluminous. In the demands that you showed me, as compiled by Rice and Maguire, I believe there was only the flat percentage increase embodied, whereas in this there is the flat percentage and also a provision that the minimum wages in each classification shall be not less than X dollars, etc. Substantially they are the same.

Q. I did not ask you to compare them, Mr. Brown. We can do that.

Mr. Herwitz: I move to strike out so much of his answer as sought to compare them.

Mr. Bruce: Well, we consent to striking out, to strike out all of that because the other is not in evidence.

Mr. Herwitz: That is right.

Q. Now, Mr. Brown, I asked you whether the document that you have just examined, Plaintiff's Exhibit 5, is the proposals that were submitted to the association by Local 32-B? A. They are.

Q. Will you tell us what those proposals were with regard to wage increases; that is, find the paragraphs in those proposals and read them into the record. A. "Provision 2: All employees herein provided for, except as hereinafter stated, shall receive an increase in their weekly wage effective from February 1, 1939, of 15 per cent."

Q. Was there anything in the union's proposal dealing with minimum wages? A. No, in provision 2.

Q. In any provision of the proposals? A. May I read provision 3?

Q. Yes. A. "Provision 3 shall be eliminated and the following provision inserted in lieu thereof:

'3. In no event shall any employees be paid less than the minimum rate of wages as follows:

'In Class C buildings, meaning buildings where the gross area is 100,000 square feet or less, minimum weekly rate of wages shall be \$26.50.

'In Class B buildings, meaning buildings where the gross area is more than 100,000 square feet and less than 200,000 square feet, the minimum weekly rate of wage shall be \$28.50.

'In Class A buildings, meaning buildings where the gross area is more than 200,000 square feet the minimum weekly rate of wage shall be \$30.75.'"

Now, there are some provisions relative to window cleaners. Do you want me to read that?

Q. No. Now will you read the proposals dealing with the hours to be contained in the new contract. A. "That provision 6 be eliminated and the following provision inserted in lieu thereof:

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*Defendants' Witness, Melvin Brown, Cross*

'6. 40 hours shall constitute a week's work for all employees covered by this agreement except watchmen and charwomen, which time shall include two 20 minute relief periods each day for elevator operators and starters but shall exclude luncheon recess which shall not exceed one hour.'"

Shall I go on to the daily hours?

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Q. Anything in that proposal dealing with hours. A. "The working day shall not exceed eight hours. Except for required relief periods and said luncheon recess, hours of work in each day shall be continuous and no man shall be required to take a relief period or time off in any day in excess of required relief periods and said luncheon recess without having such extra relief period or time off charged as working time. The hours of regular full-time employees shall continue on a full-time basis. All time worked in excess of said eight hours per day and 40 hours per week shall be paid for at the rate of time and one-half in cash. Each employee shall have two full days off in every seven days."

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Q. Will you tell me what provision of the contract related to the term, the length or term of the agreement? A. The paragraph in the proposal that refers to that is paragraph No. 16—paragraph 21st, rather:

"That paragraph 16 be eliminated and the following provision inserted in lieu thereof, to be known as provision 21:

'21. This agreement shall take effect on February 1, 1939, and continue up to and including January 31, 1940.'"

Q. Now, following the receipt by the associations of the proposals contained in Plaintiff's Exhibit 5 there were personal negotiations between the committees of the association and the union, is that correct? A. That is correct.

*Defendants' Witness, Melvin Brown, Cross*

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Q. And do I understand that you attended all of those meetings? A. I attended all of the negotiating meetings, yes, sir.

Q. I noticed on your direct examination that your memory was refreshed by certain minutes that were taken at one of these negotiation meetings, is that correct? A. Yes.

Q. Did you take those minutes? A. No.

Q. Do you know who did? A. Yes.

Q. Who? A. Mr. Rawlins.

Q. And was it customary for him to take minutes of those meetings? A. Yes.

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Mr. Herwitz: May I call upon the defendants to produce those minutes, please.

Mr. Bruce: I do not know whether we have all the minutes of all the meetings. You can have what we have here (handing to Mr. Herwitz). You haven't asked us for them before.

Mr. Herwitz: Well, they only came up today. I did not know they existed.

Mr. Bruce: Don't you keep minutes of your meetings?

Mr. Herwitz: I represent Meyer Greenberg.

These are all the minutes that you have, Mr. Bruce?

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Mr. Bruce: That is all I have in court. There are probably more in existence. I do not know that there are.

Mr. Herwitz: Would you be so kind as to ask Mr. Rawlins, who is sitting here, if he would produce the minutes of the other meetings that took place during the McGrady Agreement negotiations, and the minutes of any other meetings relating to this subject-matter and to the Meyer Agreement negotiations?

Mr. Bruce: I do not believe it is a proper request.



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*Defendants' Witness, Melvin Brown, Cross*

Mr. Herwitz: I think it is just as proper as your asking me to produce Mr. Sullivan—and I did it.

Mr. Bruce: Well, I have subpoenaed Mr. Sullivan. I couldn't get him until you produced him. You did not subpoena these things.

Mr. Herwitz: Then you refuse to do that?

Mr. Bruce: No, not at all. I just said it isn't a proper request.

Mr. Herwitz: Well, will you waive the impropriety or do you refuse to waive it?

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Mr. Bruce: I have given you everything I have, and if there are any more we will try to get them for you.

Q. Mr. Brown, are you a member of the Midtown Association? A. I am a member of the board of directors of that association.

Q. Yes. Are you also on the board of directors of the Realty Advisory Board on Labor Relations, Inc.? A. I am.

Q. Is Mr. Rawlins, whose name has just been mentioned, the executive secretary or director of that association?

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A. He is executive secretary of the Realty Advisory Board on Labor Relations, Inc.

Q. As a member of the board of directors of the Realty Advisory Board on Labor Relations could you take it upon yourself to produce any records that are in that office pertaining to the subject-matter of this testimony? A. Certainly not.

Mr. Bruce: Your Honor, I would just like to say this, that very often labor negotiations are such that both parties, for their own references, make minutes themselves of what went on at these meetings, and it may be—I haven't examined these carefully, but there may be things here that are matters of confidence that have absolutely no relation-



ship to the Wage and Hour Law. That is the reason I do not want to make a wholesale offer to produce for the union, with whom we are constantly bargaining, the confidential records of the Realty Board. Insofar as they relate to my direct examination; I have no objection to it at all. If Mr. Herwitz will in some reasonable way limit his request we will try to find all of the portions of these minutes that relate to things that are germane to this case and show them to him, if he wants them, for the purposes of this cross examination. I have given you everything that was available to me.

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Mr. Herwitz: Yes.

Mr. Bruce: But there may be things in there telling what Mr. Rawlins thinks of Mr. Herwitz or what he thought of Mr. Bambrick or Mr. Sullivan.

Mr. Herwitz: Well, that would be scurrilous.

Mr. Bruce: Oh, not at all, not at all. You are prejudging. But that is the sort of thing in there, personal impressions of people and events made in 1939. You have no right to ask and I do not understand that you are asking, but I wish you would limit your request. I do not want to restrict your cross examination. I do not want you to have all the confidential files of the Realty Board.

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Mr. Herwitz: If your Honor please, if Mr. Bruce is refusing to produce minutes on the ground that he does not have to because I haven't properly subpoenaed them or made the request, that is one thing. If he is arguing on the basis of relevancy and materiality in relation to this witness's testimony, that is another thing. This witness purported to testify this morning to the happenings at certain meetings, and then when there was a slight failure on the part of this witness so far as his memory was concerned as to one meeting, his memory was very quickly and easily refreshed by

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*Defendants' Witness, Melvin Brown, Cross*

showing him the copies of the minutes of one of those meetings.

Mr. Bruce: And defendants' counsel showed the minutes of that meeting to plaintiff's counsel.

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Mr. Herwitz: Yes, of course. That was the first indication that plaintiff's counsel had that minutes had been taken at these various meetings, and of course plaintiff's counsel could have no knowledge of the fact that Mr. Brown would testify that such meetings took place and could therefore not, prior to this time, ask for the production of those minutes. Having found out that such minutes existed, I now, for the purpose of cross examining Mr. Brown, believe that I am entitled to see them to test the truth and the veracity and the accuracy of the statements that were made by this witness. Now, if Mr. Bruce refuses to produce them I will, of course, subpoena Mr. Rawlins of the Realty Advisory Board, whom Mr. Bruce really represents in this proceeding, and go forward. I would like to find out whether his objection is on relevancy and materiality, or on the informality of the demand.

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Mr. Bruce: Your Honor, if Mr. Herwitz won't remove the statement which is exceedingly improper, that I represent Mr. Rawlins in this case, I will move to strike it out. The record in this connection, since the action was started in August, shows that we represent the Arsenal Building Corporation and Spear & Company, Inc.

Mr. Herwitz: And I represent Meyer Greenberg.

Mr. Bruce: Listen, you are not in the District Attorney's office now. Let us stick to the record. I represent the defendants, Arsenal Building Corporation and Spear & Company, Inc., in this case.

The Court: Go ahead, gentlemen, if you want to finish this case.

Mr. Herwitz: May I inquire, your Honor—I am trying to find out whether or not I can get these minutes. If I am not going to, I will have to subpoena them, but he asked me if I would produce Mr. Sullivan today, and I did.

The Court: Take that up with him after court in five or ten minutes in discussing that.

Mr. Herwitz: I would like to know before I proceed with the examination of the witness whether or not I am to have that, and if not I would like to subpoena him now. I do not think the trial ought to be held up because of his not letting me know whether he will comply with it.

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The Court: Can't you answer it without an argument, Mr. Bruce?

Mr. Bruce: If Mr. Herwitz will specify what it is he wants to see in those minutes relating to the direct examination of this witness I right now will go through those papers and mark the parts that relate to it.

The Court: Why don't you leave it this way. I should think this would dispose of it. You bring them all down here tomorrow covering that particular period and then he can tell you what part he is interested in. Then you can let him have that part, if you think it is admissible.

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Mr. Bruce: Yes.

The Court: If not, take up that discussion with the Court.

Mr. Herwitz: That is perfectly proper.

The Court: Proceed.

Mr. Bruce: Perfectly satisfactory.

Mr. Herwitz: That is satisfactory.

Mr. Bruce: What part do you want to read?

Mr. Herwitz: If this relates to any of the meetings that this witness testified to. It doesn't make

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*Defendants' Witness, Melvin Brown, Cross*

any difference whether there are other things in these minutes or not. Everything that was said at these discussions, directly or indirectly connected with the wage and hour provisions is relevant to this issue.

Mr. Bruce: You are wasting the time of the Court.

Mr. Herwitz: Then don't interrupt.

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Q. Now, Mr. Brown, have you examined the minutes of these meetings that took place in December, 1938, and January, 1939, before taking the stand in this case? A. No, I have not, other than having seen them a day or two after the minutes were taken at the time.

Q. Yes, but for the past more than three years you have not examined those minutes? A. I have not.

Q. And before taking the stand here to testify to what took place at those various discussions you did not consult those minutes? A. I did not.

Q. And you relied completely on your memory in that respect? A. That is right.

Q. You knew, however, that such minutes existed? A. That is right.

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Q. But did not attempt to refresh your recollection? A. No.

Q. And how long have you known that you were to be a witness in this case? A. Since Friday of last week.

Q. Yes. Now, after these negotiations had progressed for some time you say it was agreed by all parties that there wasn't any possibility at all that the building service employees in this dispute might be or might come under the coverage of the Wage and Hour Law? A. That was the feeling of both sides in these conferences.

Q. All right. Now, do you know Mr. Edward C. Maguire? A. Yes.

Q. Was he the attorney of Local 32-B? A. He was.



*Defendants' Witness, Melvin Brown, Cross*

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Q. I suppose he was the one that you looked to most for an expression of opinion on the legal points in the course of these discussions from the union side, is that right? A. No, we did not look to the union attorney for any legal discussion.

Q. No. A. We looked to our own attorney.

Q. And did your own attorney, Mr. Merritt, tell you that there wasn't any possibility whatsoever that the Wage and Hour Law would cover these employees? A. In substance, yes.

Q. Did he tell you that he was not in the slightest concerned about such possibility? A. He did.

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Q. Can you tell us how that discussion first came about? A. I believe that it came about in this way, when we met in the latter part of 1938 for the first time this subject, this matter became a subject of discussion for the reason that in June of that year the Fair Labor Standards Act had been passed and was made applicable in October of that year, and I think it is quite natural that at the first meeting between the union and the employers following that that the matter should come up for discussion as a new piece of legislation affecting wages and hours.

Q. You say it was quite natural. Will you tell me, was it raised by one of the members of your negotiating committee or one of the members of the union negotiating committee? A. I frankly don't remember that.

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Q. And was it at that time that Mr. Merritt gave his opinion on the subject? A. I believe so, but there were many meetings and the matter was discussed several times.

Q. Yes. Did Mr. Merritt ever give you or your committee his opinion privately? A. Yes.

Q. Now, is it your testimony that Mr. Maguire representing the corporation was equally firm and equally sure that there was no doubt whatsoever that the employees involved in that dispute were not covered by the Wage and Hour Law? A. I believe he so stated.

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*Defendants' Witness, Melvin Brown, Cross*

Q. Now, can we be sure of that? A. No.

Q. I would like to determine whether you are stating that as a fact or just a guess? A. I am stating it as what I believe to be a fact from these circumstances. All of these people were present and each and every one had something to say at some time and I, as testified, felt and feel now that there was a complete unanimity of opinion on both sides by everybody concerned, that the employees did not come within the coverage of this Act.

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Q. Could you state or could you not state that Mr. Maguire, the attorney for Local 32-B, stated that in his opinion the employees covered by this agreement were not covered by the Wage and Hour Law? A. I could not make the affirmative statement that he definitely said that.

Q. All right. Now, you know Mr. David Sullivan, do you not? A. Yes.

Q. The now president of Local 32-B? A. Yes.

Q. You have known him for a long time, have you not? A. Yes.

Q. Was he once an employee of yours? A. Yes.

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Q. When you were running the Lefcourt properties he was a starter? A. Correct.

Q. A starter in one of your buildings? A. Correct.

Q. Now, I assume, Mr. Brown, that you do not necessarily think that Mr. Sullivan is a lawyer or has any particular extraordinary legal talents. That would be a fair statement, would it not? A. Yes.

Q. In the discussions that took place in 1938 and 1939 did you in any way depend upon Mr. Sullivan's statements of what constituted interstate commerce or production for goods in interstate commerce under Sections 6 and 7 and the remaining sections of the Fair Labor Standards Act?

A. Are you saying that he made that statement?

Q. No. A. Or are you saying that I said that he made that statement?



Q. No, I did not say that. You would not and you did not have any confidence in any opinions that he might express on that subject, did you? A. Well, he never at any time went into a discussion along legal lines.

Q. That is right, and therefore I do not suppose you would remember particularly any legal opinions rendered by Mr. Sullivan at that time relative to the Wage and Hour Law, relating to the men involved in this dispute?

A. I do not see how he could render a legal opinion any more than I could.

Q. That is right. Would you say that your testimony in regard to Mr. Sullivan would be similar as regards Mr. Arthur Hareckham, the now secretary-treasurer of the union and the then, I think, vice president of the union? Would your testimony concerning him be the same? A. That I wouldn't expect a legal opinion from him?

Q. Yes. A. Yes.

Q. And not place great reliance upon it if you got it? A. Correct.

Q. And do you know Mr. Hareckham also as an employee of yours, Mr. Brown? A. That is correct.

Q. Not as an attorney, I assume? A. That is correct.

Q. What position did he hold in your organization? A. As an elevator operator in one of our buildings.

Q. And Mr. Young, do you know Mr. Young? A. I know Mr. Young.

Q. And is your testimony concerning Mr. Young on this score the same or similar to the testimony you have given regarding Mr. Sullivan and Mr. Hareckham? A. Well, perhaps I can save time by telling you that I wouldn't accept the legal opinion of anybody other than a lawyer.

Q. Yes. Would that go for Mr. Bambrick and Mr. Gold and Mr. Severino and the other members of the union negotiating committee? A. Yes.

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*Defendants' Witness, Melvin Brown, Cross*

Q. Would it be fair to say that your own opinion as to the application of the Wage and Hour Law to the employees involved in this suit was more or less dependent upon the advice you had received from your own attorney, Mr. Merritt? A. Largely.

Q. Largely. Now, Mr. Brown, you know at the time that we are discussing, in December, 1938, and January, 1939, the maximum number of hours provided under the Fair Labor Standards Act on a straight time basis was 44. Did you know that? A. Yes.

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Q. Do you recall that subsequent to the submission of the union's original demand that there was a strike? A. Yes.

Q. And do you recall that in the course of that strike there were various compromise proposals made by both sides? A. Yes, sir.

Q. Do you recall that the union's compromise proposal as to hours was to relax its demands for 40 hours a week and demand a 44-hour week? A. Yes, sir.

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Q. And do you recall that it was on the basis of that demand and the employers' refusal to accept that demand and other demands made by the union that the matter came on before Mayor LaGuardia and he said, "One hour and one buck." Is that what happened, Mr. Brown? A. That is what happened.

Q. Your association was not in favor of accepting the Mayor's proposal, was it? A. We accepted it immediately.

Q. Yes. Well, would you say it was your proposal? A. No.

Q. Would you say, Mr. Brown, that your organization had submitted that proposal to the Mayor and that the Mayor then offered it to the parties? A. To my knowledge that was never proposed to the Mayor.

Q. I ask you to look at this page and tell me whether that refreshes your recollection (handing to witness)? A.

Well, frankly, this is part of your record, and without seeing our records I would not want to answer whether this refreshes my memory or not.

Q. You can answer and tell me whether it does or does not refresh your recollection. A. Well, I, of course, am in doubt by the fact that you showed me part of the union records before and they are not the proposals submitted to us. Now, this may or may not be what was submitted to us, as you claim it.

Q. I am just asking you, does it refresh your recollection or doesn't it? A. It does not.

Q. You are not taking issue with it. You just don't remember? A. Right.

Q. Were you familiar with all the proceedings before Mr. McGrady after the Mayor's proposal was handed down? A. I believe that I attended all of the meetings with the exception of what I believe to have been the final meeting on February 12th which concerned the superintendents.

Q. Do you recall that there was an issue before Mr. McGrady as to the inclusion into the contract of some saving clause in reference to the Wage and Hour Law? A. There was a discussion with respect to a possible New York State law affecting wages and hours before Mr. McGrady.

Q. Is it your testimony that there was never any discussion before Mr. McGrady, oral or in writing, by either of the parties concerning the application of the then Wage Law? A. It is my testimony that I do not recall any such discussion before Mr. McGrady.

Q. Let me ask you, do you remember that your counsel submitted a memorandum to Mr. McGrady of the points in dispute between the parties? A. Yes.

Q. Did you examine that before it was submitted? A. At the time, yes.

Q. And do you recall that the counsel for the union submitted a like memorandum? A. Right.

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*Defendants' Witness, Melvin Brown, Cross*

Q. Did you examine that? A. I don't believe so.

Q. Were you present when the arguments took place before Mr. McGrady? A. I was present at the negotiations before Mr. Grady, but I believe that the procedure adopted by him was that counsel for each side was to submit a memorandum of the differences and that there ensued conferences among Mr. McGrady and two counsel.

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Mr. Herwitz: I ask Mr. Bruce whether they have in their files the memorandum which was submitted by Mr. Merritt to Mr. McGrady and the counter memorandum which was submitted by Mr. Maguire to Mr. McGrady.

Mr. Bruce: I think we have the one that our office submitted to Mr. McGrady. We searched our own files to find the union's and I was disturbed at not finding it. It may be here.

Mr. Rawlins: We never had one. There is a copy of Mr. Merritt's, though.

Mr. Bruce: Mr. McGrady had the originals.

Mr. Herwitz: Do you have copies?

Well, while you are looking for that I will go on to something else.

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(Discussion off the record between Mr. Bruce and Mr. Herwitz.)

Mr. Bruce: Here is the one as submitted by the Realty Board (handing to Mr. Herwitz).

Q. Mr. Brown, at the time that these negotiations were going on, I suppose you avidly read the newspaper accounts of the negotiations, did you not? A. I do not recall in connection with these particular negotiations whether they were reported daily or not. I can tell you that if there is anything in the papers relating to it I read it.

Q. Yes. A. Whether avidly or not.

Q. Now, did you, when you read the papers, note that when Mr. Bambrick, president of the union, came back to

the membership of the union to present the Mayor's counter-proposal, that he was not very joyously greeted by the members of the union?

Mr. Bruce: Your Honor, I object to the form of the question.

The Court: Why do you object to it?

Mr. Bruce: I object to it because it asks Mr. Brown whether or not he read a newspaper to see whether Mr. Bambrick's proposal was not joyously received, and that is entirely hearsay, isn't it?

The Court: I think it is.

Mr. Bruce: As to a newspaper report.

Mr. Herwitz: Well, I do not like to argue the ruling, your Honor, but I would just like to point out that the obvious incompetence of the offer I have just made, or the question I have just put, results from the fact that there is already in his testimony a magazine article written by or allegedly written—

The Court: Well, yes, that is different. There we have definite statements by an alleged officer of the union. Here we have statements by somebody who is unknown, as I understand it.

Mr. Herwitz: Yes; but, if your Honor please, we are interested here in not only what the officers of this union thought—

The Court: Do you mean to suggest this, Mr. Herwitz, that any statement made in that paper is an official statement of your position? If so, I think that is admissible.

Mr. Herwitz: No. I intend to show the statement to him and ask him whether he read it first.

The Court: Ask him that.

Mr. Herwitz: All right.

(Paper handed to witness by Mr. Herwitz.)



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*Defendants' Witness, Melvin Brown, Cross*

The Witness: What is your question, Mr. Herwitz?

Q. Did you read that article in the newspaper? A. At the time, yes.

Q. Did you have any discussion—

Mr. Bruce: I did not hear him.

Mr. Herwitz: He said he read it.

Mr. Bruce: You mean he read it now or he read it when it was published?

Mr. Herwitz: When it was published.

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Q. Do you recall that in the course of your negotiations with Mr. Bambrick and the other members of the union that Mr. Bambrick told your committee that the proposals of the Mayor were distasteful to the membership of the union? A. I don't remember any statement by Mr. Bambrick to that effect, but I agree that it is quite possible that he made it.

Q. Well, don't you recall that as far as your side was concerned the real difficulty with the union was not with Mr. Bambrick but with his inability, as he stated to you, of his getting the membership of this union to go along with him on the Mayor's proposal? A. No, I don't believe that was the difficulty at all.

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Q. Didn't you know at that time from your discussions in the committee that the proposal of the Mayor was distasteful to the membership of the union and that they did not want to accept it and that they wanted to continue the strike? A. My recollection, Mr. Herwitz, was as I stated in the testimony, that at the meeting with the Mayor in the room of the Committee of the Whole that he handed down this dictum, as it were, and the employers accepted. The union said they were in no position to accept without referring to the membership, and I believe that the Mayor's answer was, "I want an answer right away. I want this strike to stop."

Q. And did he get an answer right away? A. I believe

that 24 or 48 hours was given to the union in which to propose it to the membership.

Q. And isn't it a fact that the Mayor gave both parties something like 15 minutes or a half hour, or something like that, to give him their opinion and make their decision? A. My recollection is that while the Mayor was still in the room and before he went on the air we gave him our immediate acceptance.

Q. The employers did? A. The employers did.

Q. But the union did not? A. The union insisted that they could not.

Q. And they said they had to put it before the members? A. That is correct.

Q. Don't you recall that Mr. Bambrick had difficulty and told you he had difficulty and that it was almost impossible to get the members of this union to agree on that proposal? A. I don't remember any such statement from Mr. Bambrick.

Q. Don't you recall that the strike went on for a little longer than you expected it would because of his inability in that regard? A. I think that the strike went on until he had had an opportunity to make the proposal to the rank and file and bring an answer back to the Mayor.

Q. Yes, and didn't he tell you that he had great difficulty in getting that approval from the membership? A. I don't believe there were any meetings prior to the time or rather between the time that he asked for time to propose it to the union and the time that he brought back the acceptance.

Q. Need I ask you whether Meyer Greenberg, the plaintiff in this action, was present during any of the negotiations and discussions that you have testified to?

Mr. Bruce: Your Honor, we stipulated this morning that he was not.

Q. He was not, was he? A. No.

442

*Defendants' Witness, Melvin Brown, Cross*

Q. Now, Mr. Brown, after the McGrady Agreement was entered into, did you hear anywhere about the fact that the union was making a claim or seeking to have it established that building service employees were covered by the Wage and Hour Law? A. I did not.

Q. When was the first time you were made aware of that? A. My recollection is that the first time that the union was concerned with any such situation was after the Circuit Court of Appeals' decision in December, 1941.

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Q. As a member of these associations and negotiating committees since 1935 and 1936 are you an avid reader of the "Building Service Magazine"? A. I have never received a copy in my life.

Q. And you have never read it? A. No.

Q. But you have kept yourself familiar with the developments in the industry? A. Very definitely.

Q. And you are very concerned with the activities of Local 32-B? A. Only as relating to the industry.

Q. As relating to the industry? A. Yes.

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Q. And will you say as a fact that you did not learn as early as—at least as early as March, 1940—that the union had co-operated with the Wage and Hour Division in getting the facts concerning 463 Seventh Avenue, the Arsenal Building, for the purpose of aiding the Government in bringing an injunction proceeding to enforce the Wage and Hour Law? A. I frankly don't remember the date.

Q. Well, do you recall the substance of the fact that I have just mentioned? A. I frankly did not know that the union was co-operating with the Wage and Hour Division.

Q. That is something entirely new to you? A. No, that is not new to me now. It was new to me until quite recently.

Q. You never saw that in any newspaper? You never read that— A. I never read that the union was co-operating with the Wage and Hour Division, no.

Q. That is a complete surprise to you? A. Not at this time. It is a relatively new surprise, yes, in recent months.

Q. Is it your testimony that it was only when the Circuit Court's decision came down that you heard of the union having an interest in this wage and hour situation? A. Yes.

Q. That is the first time? A. Yes.

Q. Didn't you ever hear, weren't you ever told, didn't you ever know that the members of this union in October and November, 1939, a committee or an executive committee of the union had gone down and seen the head of the Wage and Hour Division relative to this very action? A. Certainly not.

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Q. And you did not read that in the union magazine that such a thing had been done? A. I told you that I never received a copy of that magazine and could not read it.

Q. Do you attend periodically meetings of these various associations of which you are a member? A. I am only a member of the Midtown Association. I attend all their meetings.

Q. Yes. Is it your testimony that there never was any discussion in any of these meetings about the fact that the union was co-operating with the Wage and Hour Division in this Arsenal Building case? A. I don't ever remember any such situation.

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Q. Did you know that Mr. David Sullivan, the present president of Local 32-B, had contended from the very beginning that building service employees should come under the Wage and Hour Law? A. I know quite the opposite to be true.

Q. You do? A. Yes.

Q. Now, I ask you to examine "Building Service Magazine" for April, 1941—

Mr. Bruce: What is the date?

Mr. Herwitz: April, 1941.

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*Defendants' Witness, Melvin Brown, Cross*

Q. —and tell me whether you ever read that article (handing to witness)?

Mr. Bruce: He said he has never read any of it.

A. No, I did not read this article.

Mr. Bruce: What is the date again, Mr. Herwitz?

Mr. Herwitz: April, 1941.

I offer this article in evidence as Plaintiff's Exhibit 6.

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Mr. Bruce: Your Honor, I object to it until it is established by the same method that Mr. Herwitz required me to use this morning.

Mr. Herwitz: I ask that it be marked for identification.

The Court: That is a copy of what?

Mr. Herwitz: The "Building Service Magazine," April, 1941.

(Marked Plaintiff's Exhibit 6 for identification.)

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Q. Now it is your testimony that the union was only concerned in 1939 with the Wage and Hour Law insofar as it applied to future legislation; is that right? A. My testimony is they were only concerned as to State legislation.

Q. Yes, future State legislation. A. Correct.

Q. There isn't any doubt, is there, that the union made its position clear as far as a new State legislation was concerned, that in the event there was such that the hours specified in any new State legislation, that is, that any reduction in hours should not bring about any consequent reduction in weekly wages? A. That was their position before Mr. McGrady.

Q. No question about that, is there? A. No question about it.

Mr. Herwitz: May I see the McGrady decision? Do you have that?



*Defendants' Witness, Melvin Brown, Cross*

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Mr. Bruce: Yes. Do you mean the McGrady award?

Mr. Herwitz: Yes.

(Document handed by Mr. Bruce to Mr. Herwitz.)

Q. Referring to Defendants' Exhibit F, a notice from the award of Mr. McGrady, in reference to the request that some provision be put in the contract in the event of wage and hour legislation, that Mr. McGrady said on the first page of the award: "The parties differ as to the necessity for this paragraph." Now, is it your recollection that Mr. Merritt, let us say, and Mr. Maguire sharply differed as to the necessity of the insertion of any paragraph relative to the Wage and Hour Law?

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Mr. Bruce: State legislation.

A. Well, I believe they differed sharply as to the wording of it.

Q. Yes. Now, Mr. Bruce has whispered to me, "State Wage and Hour Law." I ask you if it is not a fact that the proposal of the union did not make any mention of a State Wage and Hour Law. Look at it, Mr. Brown (handing to witness)—"The last paragraph of Provision '2' as submitted to me would have read." A. Do you want me to read it out loud?

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Q. Yes. A. "If during the period hereof, by any law, the hours of employment are reduced below the hours provided for herein, then this agreement shall be deemed to be and be amended to provide that hours of employment hereof, including relief periods, shall be as prescribed by such law or laws without any diminution of wage rates."

Q. Yes. That did not say anything about any State Wage and Hour Law, did it? A. No, it said "any law."

Q. "Any law." A. Yes.

Q. And that was the union's proposal? A. Yes.

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*Defendants' Witness, Melvin Brown, Cross*

Q. And in making that proposal, Mr. Merritt, counsel to the Realty Board, said it was not necessary; is that right? A. He did not make that proposal. That was the union's language.

Q. No. As to that proposal, Mr. Merritt said it was not necessary? A. His position, as I remember it at the time, was that there was no necessity for putting anything in the contract about it. We were referring it to the arbitrator or refer it back to Mr. McGrady.

455

Q. Well, before Mr. McGrady he said it was not necessary to put that clause in the contract; isn't that so? A. Based upon it being referred back or reopened.

Q. Well, I just read to you that it said, according to Mr. McGrady—and I am now asking you whether Mr. McGrady's statement is true according to your recollection. He says: "The parties differ as to the necessity for this paragraph." Now, is that a fact? Did they so differ? A. Of course, they did.

Q. And Mr. Merritt said it was not necessary; isn't that so? A. He said it was not necessary but coupled with it the reason for it not being necessary was that there should be a reopening or a rediscussion with Mr. McGrady if such a law was enacted.

456

Mr. Herwitz: Now, I have not examined the submission of Mr. Merritt to Mr. McGrady. I do not know whether there is anything in this submission that you have given to me relative to that. Show that to me.

Mr. Bruce: I suggest that you read it into evidence, that paragraph.

Mr. Herwitz: Which one, Mr. Bruce?

Mr. Bruce: Right there (indicating). I will agree to that going into evidence, that paragraph, with the understanding that that was the employers' position before Judge McGrady.

Mr. Herwitz: All right.

*Defendants' Witness, Melvin Brown, Cross*

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Q. Now, is this what Mr. Merritt's position was—and I shall be very happy to read it: "It is"—

Mr. Bruce: Wait a moment. Are you going to offer it?

Mr. Herwitz: Well, I would like to read it into the record and we will agree that that is what he says.

Mr. Bruce: Don't read from a document not in evidence, unless you are going to read from it by consent.

Mr. Herwitz: Well, I will offer it.

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Mr. Bruce: I want you to identify what it is. Just don't read it in vacuo.

Mr. Herwitz: I will offer the document in evidence as a submission of the Midtown Realty Owners Association, Inc., and Penn Zone Association, Inc., I presume prepared by Walter Gordon Merritt.

Mr. Bruce: I suggest that you do it in this way: That it is conceded that the following language constitutes the position taken by the employer associations before Mr. McGrady with respect to A, State Wage and Hour Act, and then you read that paragraph. That is what I am consenting to.

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Mr. Herwitz: All right, I shall do that now.

The Court: What is the date?

Mr. Herwitz: February, 1939. "It is the position of the employers that the Mayor's proposal definitely and clearly established the weekly hours which were to prevail during the term of the agreement, and that no further reduction in such hours should be made during the term of the agreement, notwithstanding the possibility that the State of New York may enact a Wage and Hour Statute applicable to this industry. The Mayor's statement is definite and unambiguous, 47 hours for the first 18 months; 46 hours for the second 18 months. The

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*Defendants' Witness, Melvin Brown, Cross*

employers cannot in good faith be asked to consent to anything different. The matter is settled. What some law may do is another matter but cannot be grafted onto any contract."

Q. Now, that was Mr. Merritt's position, was it not?

A. At the beginning, yes.

Q. And that was not—in the beginning? A. Yes, sir.

Q. Did he change that position? A. He changed it when Mr. McGrady proposed the language that is at present in the contract, and it was consented to by Mr. Merritt.

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Q. You mean all of Mr. McGrady's proposals were consented to by Mr. Merritt? A. No, but the attorneys for both sides were consulted by Mr. McGrady.

Q. Yes. A. In the writing of these particular paragraphs, that I happen to know, and he consented to the writing of this paragraph as it was finally written in the award and in the contract.

Q. And is it your contention that Mr. Maguire consented to it, too? A. Yes.

Q. Do you note that there is nothing in the paragraph, as ultimately written, about any existing wage and hour laws? A. That is correct.

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Q. It only referred to State Wage and Hour Laws or legislation in the future? A. That is correct.

Q. And that was all that was agreed to by the parties? A. That is correct.

Q. And they agreed to make no such agreement as to wage and hour law then in existence; isn't that so?

A. We had already agreed that we were not under that coverage, so there was no provision in the contract for it.

Q. Now, when was the first time, Mr. Brown, that you ever heard of any formula for computing wages and hours? A. I believe subsequent to January 5, 1942.

Q. In 1939 you had heard of no formula, had you? A. No.

*Defendants' Witness, Melvin Brown, Cross*

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Q. In 1939 there was no discussion of any formula, was there? A. No.

Q. In 1939 you knew nothing about computing hours by dividing by the number of hours actually worked, plus one-half the number of hours worked in excess of the prescribed number of hours in accordance with the Wage and Hour Law? A. I did not.

Q. Do you understand it now? A. Yes.

Q. Who was the first one who told you about any such method of, shall I say, getting around the Wage and Hour Law? A. The formula was first described to me by Mr. Walter Gordon Merritt.

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Q. And was it customary that the counsel to the Association, before submitting proposals to the union, discussed it with the members of the negotiating committee representing the various associations? (A. Under) normal circumstances, yes.

Q. And do you know whether this was a normal circumstance? A. This was distinctly not a normal circumstance.

Q. Well, do you know whether or not before submitting that proposal to the union he first submitted it to you and to the members of your committee? A. My recollection is that he first discussed it in Mr. Arthur S. Meyer's office with Mr. Meyer and the members of our negotiating committee.

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Q. Do you understand that was the first time that anybody engaged in those negotiations discussed it? A. That is my own belief.

Q. So that the idea of a formula came from Walter Gordon Merritt? A. Yes.

Q. In 1942? A. Yes.

Mr. Herwitz: Might I have a short recess, your Honor?

The Court: Yes.

(Short recess.)



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*Defendants' Witness, Melvin Brown, Cross*

Q. Mr. Brown, at the first meeting that took place between the association and the union was there any discussion—

Mr. Bruce: When?

Mr. Herwitz: I am sorry.

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Q. In December, 1938, relative to the negotiations for the McGrady agreement, were there any discussions at the first meeting about the applicability or non-applicability of the Federal United States Fair Labor Standards Act? A. I do not recall exactly, but I do not think so. My memory seems to tell me that the first meeting between the union and the association committees was for a reopening or rather a renegotiation of a new contract and for possible receipt of the union demands—and I don't think we even got the union demands at that first meeting. At least that is my recollection.

Q. Do you remember when the first meeting took place? A. My recollection is that it was in the early part of December.

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Q. At the second meeting between the associations and the union, do you recall any discussion on that point? A. I believe that the second meeting—at the second meeting the union demands were presented and that we retired shortly after the meeting with the idea of examining the demands, and I do not believe the subject was discussed at that time.

Q. Yes. Now, at the third meeting between the union and the associations did you have such a discussion? A. I think it is possible that we did but I don't remember exactly.

Q. Well, the first time that you sat down to have a more or less complete exploratory discussion did you discuss the Wage and Hour Laws and its application or non-application to the employees involved in this dispute? A. I believe we did.

Q. Would you examine what purports to be the minutes of Wednesday, December 21, cursorily examine it and tell me whether you think that was the first meeting at which there were any extensive discussions of the union demand (handing to witness)?

Mr. Bruce: What meeting?

Mr. Herwitz: December 21.

A. I believe this was the first meeting at which it was discussed.

Q. At which what was discussed? A. The question of the provision in the contract relative to the possibility of a State Wage and Hour Law.

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Q. Was anything said at that conference to the effect that the present Wage and Hour Law did not apply to the employees? A. I believe it was at that conference that this discussion was held.

Q. Yes. And is that the conference at which time all parties agreed that the present Wage and Hour Law did not apply? A. That is correct.

Q. That is when you said it happened? A. That is, I believe, when it was first discussed.

Q. And these are the minutes of that meeting? A. That is right.

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Q. Will you point out in the minutes the statement or anything in the minutes indicating that any members of the union negotiating committee stated that the Federal Fair Labor Standards Act did not apply to the employees involved?

Mr. Bruce: I object to that until you put it in evidence. I do not object to having the minutes go into evidence.

Mr. Herwitz: I will introduce it. I will offer it. (Marked Plaintiff's Exhibit 7.)

The Court: What is the date of that?

The Witness: December 21, 1938.

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*Defendants' Witness, Melvin Brown, Cross*

The Court: Minutes of what?

Mr. Herwitz: They are the minutes taken by the representative of—

The Court: Real Estate Owners?

Mr. Herwitz: Real Estate Owners, of negotiations between the parties on December 21st.

Mr. Bruce: Will you have the stenographer re-read the question?

Mr. Herwitz: All right. Will you do so, please?

Q. (Read.) A. There is nothing in these minutes with  
473 respect to that.

Q. But this is the meeting at which that discussion took place? A. To the best of my recollection, yes. But Mr. Rawlins is not a court stenographer and does not take dictation. He writes in there what he thinks is important.

Mr. Herwitz: I move to strike that out.

Mr. Bruce: I think the answer should stand.

Mr. Herwitz: Not responsive to the question.

The Court: Well, I think it is.

Mr. Herwitz: Responsive to the question?

The Court: It states in substance that he does not take down everything.

Mr. Herwitz: If your Honor please, I merely  
474 asked him whether or not it was in these minutes. I am not vouching for the accuracy or inaccuracy of the minutes.

The Court: I think that is a fair answer.

Mr. Herwitz: All right. I would like to cease my further examination of this witness until I have an opportunity to examine the other minutes that were taken of these various negotiations.

The Court: And those will not be available to you until tomorrow morning; is that right?

Mr. Herwitz: That is correct.

Mr. Bruce: Your Honor, all the minutes that I

*Defendants' Witness, Melvin Brown, Cross*

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have here—you can go ahead with these (handing to Mr. Herwitz).

Mr. Herwitz: Even as to those I will introduce them in evidence. I want them to go in evidence but I haven't had a chance to examine them. I wish that the other side would, at my expense, have photostats made of them—or that might be a little expensive.

Mr. Bruce: Of course, there is a great deal of irrelevant material in there. Why don't you look them over and pick out the parts that you want to put in evidence?

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Mr. Herwitz: I will be glad to put all of them in evidence. I think they all should be in evidence because of what they say or what they don't say. I offer them in toto in evidence, but I would like to withhold further examination until I have a chance to examine these and any other documents.

The Court: You are now offering them, are you?

Mr. Herwitz: Yes, I am, your Honor.

Mr. Bruce: Are you offering all those that I handed to you?

Mr. Herwitz: Yes, I am.

Mr. Bruce: Well, I have no objection.

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Mr. Herwitz: All right. I am offering the minutes of December 23, 1938.

(Marked Plaintiff's Exhibit 8.)

Mr. Herwitz: I offer in evidence the minutes of January 16, 1939.

(Marked Plaintiff's Exhibit 9.)

Mr. Herwitz: I offer in evidence the minutes of January 18, 1939, as Plaintiff's Exhibit 10.

(Marked Plaintiff's Exhibit 10.)

Mr. Herwitz: I offer in evidence the minutes of January 20, 1939, as Plaintiff's Exhibit 11.

(Marked Plaintiff's Exhibit 11.)

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*Defendants' Witness, Melvin Brown, Cross*

Mr. Herwitz: That is all for this witness as far as I am concerned at this time.

Mr. Bruce: What do you mean "at this time"?

Mr. Herwitz: Well, I am waiting for you to produce the other copies of minutes and also produce—

Mr. Bruce: I do not know that there are any others, but I will produce any others there are.

Mr. Herwitz: I have also asked for the Realty Board's file on this.

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Mr. Bruce: Well, these are the minutes taken by Mr. Rawlins.

Mr. Herwitz: And I have also asked for the full file of the Realty Board on these negotiations, of the McGrady negotiations and on the Meyer agreement negotiations and the files of the Midtown and Penn Zone.

Mr. Bruce: Don't you want the National War Labor Board file and the extract—

Mr. Herwitz: I do not think you have to be so smart, Mr. Bruce.

Mr. Bruce: Well, why don't you try to limit the case to the issues?

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Mr. Herwitz: Well, I tried but you prevented it. I do not want to get into this discussion with him, your Honor, but I do not know whether I do—

Mr. Bruce: Your Honor, I am willing to produce all the minutes of the meetings that we have with regard to the union and employer groups leading up to the negotiations of the McGrady agreement, and I will produce them on the Meyer agreement, if you want those, too. Do you want the Meyer agreement, too?

Mr. Herwitz: I certainly do.

Mr. Bruce: All right, we will produce those.

Mr. Herwitz: And I want the files of the Midtown



*Defendants' Witness, Melvin Brown, Re-direct*

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Association, the Penn Zone Association relative to this testimony of this witness on the negotiations that he has testified to.

The Court: Any re-direct examination, Mr. Bruce?

Mr. Bruce: Well, I have just one more question I want to ask Mr. Brown.

*Re-direct Examination by Mr. Bruce:*

Q. Mr. Brown, when the union, Local 32-B, signed an agreement in February, 1939, for a 47-hour week for the first 18 months of that agreement, and a 46-hour week for the last 18 months of that agreement, did you and your associations and the employers represented by you rely on that agreement and on the fact that the union and its members would not demand overtime under 47 hours?

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Mr. Herwitz: I object to that.

The Court: Objection sustained.

Mr. Bruce: The very same question was permitted Mr. Herwitz, your Honor, as to what they relied on in these negotiations.

The Court: I don't remember that.

Mr. Bruce: He asked Mr. Brown whether or not he relied on certain statements made by Mr. Sullivan and Mr. Bambrick, and I am asking him with respect to their attitude—

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The Court: There was no objection then.

Mr. Bruce: —to the Wage and Hour Law. You are quite right, your Honor. There was no objection.

The Court: Well, here there is an objection and I think you will agree that you cannot ask the witness what he relied on.

Mr. Bruce: Your Honor, I do not understand why I cannot ask this man whether or not he relied on the union agreement.

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*Defendants' Witness, Joseph Ferdinand, Direct*

The Court: No. I think that is a matter for the Court. He may state what the facts are, but—

Mr. Bruce: It seems to me that reliance is a factual concept as well as a legal concept.

The Court: That is one of the times when perhaps what Mr. Herwitz described as an operation of a witness's mind—of course, when he answered every question that called for the operation of his mind, but this is calling for a conclusion. He may state the facts.

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Mr. Bruce: Well, the facts are pretty well in the record; the fact that the union and the employers did sign the agreement indicates a reliance. I had supposed that was a factual conclusion as well as a legal conclusion. I have no further questions, then, your Honor.

Mr. Herwitz: Would your Honor direct this witness to return tomorrow?

(Discussion off the record.)

Mr. Herwitz: You will return tomorrow, will you not, Mr. Brown.

The Witness: Yes.

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Mr. Bruce: Mr. Ferdinand.

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JOSEPH FERDINAND, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

*Direct Examination by Mr. Bruce:*

Q. Mr. Ferdinand, where do you live? A. 8907 247th Street, Bellerose, Long Island.

Q. You are the present superintendent of the Arsenal Building at 463 Seventh Avenue, are you not? A. Yes.

Q. Have you been a superintendent there since the building was constructed? A. Yes.

*Defendants' Witness, Joseph Ferdinand, Direct*

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Q. By whom were you employed as superintendent of the building? A. By the owners of the building at that time.

Q. And when was that, approximately? A. About 18 years ago.

Q. About 1925? A. That is right.

Q. Was Arsenal Building Corporation the owner of the building at that time? A. No.

Q. Who was, if you recall? A. The Seventh Avenue and 35th Street Corporation.

Q. Was there a Mr. Greenberg a principal in that corporation? A. Henry Greenberg; yes, sir.

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Q. Do you know whether or not he was related to Mr. Meyer Greenberg, the plaintiff in this case? A. He was a cousin of his.

Q. Tell the Court briefly what your duties have been as superintendent of this building since October 24, 1938.

A. Hired the help, supervised the cleaning, make repairs and so forth.

Q. What authority do you have with respect to hiring and firing of building service employees employed at the Arsenal Building? A. I do the hiring and do the firing.

Q. Where do you do the hiring? A. Where?

Q. Yes, through whom? A. Well, through the union most of the time.

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Q. That is, when you want a man you call up the union and ask whether they have a man to fill the bill or fill the job? A. That is, since the union has been in existence, yes.

Q. And you have followed that practice since about 1934? A. That is right.

Q. Who is the managing agent for this building? A. Spear & Company.

Q. Do you regularly consult them when you want to hire a man? A. No, I don't.

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*Defendants' Witness, Joseph Ferdinand, Direct*

Q. Do you ever consult them in connection with hiring or firing of employees? A. No.

Q. You have full discretion? A. That is right.

Q. In that respect? A. That is right.

Q. And your discretion in that respect, has that ever been challenged or questioned by Spear & Company? A. Well, they did a few times ask me to put some men on there. I did, and I stopped the practice on the grounds that they took advantage of the fact that they were sent by the owners or agents.

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Q. In other words, you have rejected suggestions for employment made by the managing agent? A. That is right.

Q. Are you acquainted with the plaintiff, Meyer Greenberg? A. Yes.

Q. How long have you known him? A. About 15 or 16 years.

Q. And how long has he been employed as an elevator operator in the Arsenal Building? A. About 15 years.

Q. Have your relationships with the employees of the building been close and friendly? A. Yes.

Q. At all times? A. At all times, yes.

Q. And with Meyer Greenberg? A. Yes.

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Q. And do they talk over problems in the building with you on occasion? A. Who?

Q. All of the employees. A. Well, no, they don't.

Q. Do they ever make any complaints to you about things in the building? A. In reference to what?

Q. Well, have any of these employees since October 24, 1938, ever complained to you that they were not being paid overtime in accordance with the Federal Wage and Hour Law? A. No, they never did.

Q. As superintendent of the building is it your duty to supervise the making up of the weekly pay roll and the paying of all the employees? A. Yes.

*Defendants' Witness, Joseph Ferdinand, Direct*

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Mr. Herwitz: If your Honor please, just so that I make my record clear, insofar as the testimony of this witness being introduced in connection with the allegations of the complaint that no complaint was made and that the money was accepted, I object on the ground that it is irrelevant and immaterial.

The Court: On the ground of what?

Mr. Herwitz: Irrelevant and immaterial.

Q. Tell the Court, Mr. Ferdinand, in as brief compass as you can, what your procedure is each week with respect to making up of the pay roll and payment of the employees. I have particular reference to that period beginning and subsequent to October 24, 1938. A. I make out the pay roll, send it in to Spear & Company on Wednesdays, call for the pay roll on Fridays and they return the pay roll to me with a check for the full amount. I take this check to the bank, cash it, and distribute the money among the men.

494

Q. That is, you prepare envelopes, do you, for each employee? A. I do.

Q. With his weekly wages? A. That is right.

Q. With the cash proceeds from that check? A. That is right.

495

Q. I show you this paper, Mr. Ferdinand, and ask you whether this is the pay roll for the week of April 14, 1939, to April 20, 1939 (handing to witness)? A. Yes.

Q. As prepared by you? A. That is right.

Q. And this signature— A. This is my signature.

Q. Your signature? A. That is right.

Q. And the writing on this document, except the signatures in the right-hand column, is your writing, is it not, or your printing? A. Everything is my writing with the exception of what is on here (indicating), and what is on top here.



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*Defendants' Witness, Joseph Ferdinand, Direct*

Q. On top? A. Yes (indicating).

Mr. Bruce: I offer this in evidence, Mr. Herwitz.

The Court: What is that, a pay roll?

Mr. Bruce: A pay roll. I have some more questions about it, but I will offer it so that we can talk about it.

Mr. Herwitz: None except my general objection, your Honor.

The Court: A pay roll for what period?

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Mr. Bruce: It is a pay roll sheet for the week beginning April 14 and ending April 20, 1939.

(Marked Defendants' Exhibit H.)

Q. I show you Defendants' Exhibit H, Mr. Ferdinand, and ask you whether this pay roll form is typical of the form that has been used by the Arsenal Building Corporation since October 24, 1938, up to February 5, 1942? A. That is about the same, yes.

Q. And I ask you whether or not this signature on line 10 is the signature of Meyer Greenberg (indicating)?

A. That is right.

Q. And was that signed in your presence? A. In my presence, yes.

498

Q. And this line on which Mr. Greenberg's signature appears shows, does it not, that during that week he worked 47 hours; is that correct? A. That is right.

Q. And that his wages for that week were \$28.75; is that correct? A. Yes, that is correct.

Q. And that column is headed "Regular wages for the period"? A. Yes.

Q. Is it not? A. That is right.

Q. And this deduction over here of 29 cents is for Social Security, is it not? A. That is right.

Q. You note that Mr. Greenberg received in that week \$28.46? A. That is correct.

Q. That represents, does it not, the cash that he received in the envelope from you? A. That is right.

*Defendants' Witness, Joseph Ferdinand, Direct*

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Q. Is that correct? A. Yes.

Q. This entry at the top of the page opposite "Employer," which says, "Arsenal Building Corporation; Employer, address 225 Fifth Avenue," who made that entry, please? A. I did.

Q. Every week since October 24, 1938, in which Meyer Greenberg has worked at the Arsenal Building has he been required to sign a pay roll in similar form to Defendants' Exhibit H before he received his wages in cash? A. That is right.

Q. And that is true, is it not, of the other building service employees there? A. That is right.

500

Mr. Bruce: I merely want to read, your Honor, pursuant to our previous policy the heading of the column in this pay roll above the signatures of the employees. It says, "Received payment in full for wages to date. Tax deduction also acknowledged and approved as to amount shown in column 8."

Q. Mr. Ferdinand, after you have paid the employees for their work each week and have the pay roll signed by them, what do you do with the pay roll sheet? A. Return it to Spear & Company.

Q. It is a fact, is it not, that since October 24, 1938, all the employees of the Arsenal Building have been members of Local 32-B? A. Yes, that is right.

501

Q. The building is popularly known as a closed shop building in common with all other buildings, most other buildings in the garment center area; isn't that true? A. That is true.

Q. Did the plaintiff, Meyer Greenberg, ever complain to you at any time subsequent to October 24, 1938, that he had not been paid his full wages? A. He never did.

Q. Did he ever complain to you that he had not been paid full overtime under the Wage and Hour Law? A. He never did.

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*Defendants' Witness, Joseph Ferdinand, Cross*

Q. Have any of the employees ever asked you for any information about the hours worked by them in the past? In other words, have they ever asked you to give them any data about the hours that they worked in the building? A. Yes.

Q. When and under what circumstances? A. I believe at that time that they were about to bring a lawsuit against the building.

Q. And when was that, Mr. Ferdinand? A. It was some time, I believe—some time last summer. I don't just remember the month.

503

Q. The suit against the Arsenal Building Corporation was started, I believe, as the records in this court will show, on August 11, 1942. That is last summer, August, 1942? A. That is about the time.

Q. Does that refresh your recollection? A. That is right.

Q. And is that the only time that you recall they have ever asked you for such data? A. Well, they didn't ask directly. They hinted about it in some way.

Q. Did they tell you that they were going to bring a suit? A. No.

504

Q. Or thinking of bringing a suit? A. No, they did not. It was a rumor around at the time.

Q. A rumor in the building? A. That is right.

Q. And on Saturday, Mr. Ferdinand, you discussed this testimony that we have just gone over with me, did you not? A. I did, yes.

Mr. Bruce: Your witness, Mr. Herwitz.

*Cross Examination by Mr. Herwitz:*

Q. Mr. Ferdinand, are you a member of the union? A. Not 32-B, no.

Q. Are you a member of any union? A. Yes.

Q. And what union are you a member of? A. 164.

Q. How long have you been a member of Local 164?

A. Ever since it has been in existence. I just don't remember how many years it is.

Q. How long did you say you have been superintendent of this building? A. About 18 years.

Q. About 18 years. Who hired you? A. Mr. Henry Greenberg did.

Q. Was he the owner of the building? A. He was the owner of the building at the time.

Q. I see. And was that when the building first opened? A. Well, it was really before the building was opened, two or three months before the building was opened.

Q. And you were engaged as superintendent? A. That is right.

Q. Had you worked before that? A. Yes.

Q. Whom had you worked for before that? A. It was Greenhut.

Q. Well, if it is difficult for you to recall it— A. Spear & Company was the agent in that building, too.

Q. I see. You worked for a building where Spear & Company had been the agent? A. That is right.

Q. Do you know whether they recommended you to Mr. Greenberg? A. They did.

Q. And in the building you worked at before you worked at the Arsenal Building had you been engaged by Spear & Company, the agents? A. By the owner through Spear & Company.

Q. What do you mean by "by the owner through Spear & Company"? A. Because I was recommended for the job by Spear & Company.

Q. To whom did you apply for the job? A. Spear & Company.

Q. I see. And would you state before you went with the Arsenal Building here that you applied for the job or did they seek you? A. No, no. Spear & Company also got me that job.

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*Defendants' Witness, Joseph Ferdinand, Cross*

Q. In other words, you were really engaged through Spear & Company as a superintendent of the Arsenal Building? A. That is right.

Q. And for how many years have you been working under Spear & Company as the agents of the building? A. Three years in the other building and 18 years in this building.

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Q. And you would say that you work under Spear & Company, the agents of the building, would you not? That would be a correct statement of the relationship? A. Well, I don't know if it would be right. The pay roll is on the Arsenal Building Corporation.

Q. Yes, we understand that the owner of the property is the Arsenal Building Corporation. A. Yes.

Q. We are not discussing now technical legal terms of who is or is not the employer, Mr. Ferdinand. I am asking you whether or not you consider yourself as working under Spear & Company, under their direction? A. I do.

Q. And I suppose that they have from time to time given you general instructions as to the conduct? A. They do.

Q. Of the building? A. They do.

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Q. And would that also include the general instructions relating to the kind of employees to hire, or the type or the number of employees to hire for the building? A. The number of employees to be hired but not the type.

Q. The number? A. That is right.

Q. And do you fix the wages in the building for the employees? A. No, I don't.

Q. Does Spear & Company take care of that? A. Well, yes, they do, yes.

Q. Would they have the right, according to your understanding of your relationship to Spear & Company, to direct you to employ or to discharge any of the



*Defendants' Witness, Joseph Ferdinand, Cross*

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employees of the Arsenal Building? A. To discharge? I don't think they could if they wanted to on account of the union.

Q. Well, they could try, couldn't they? A. Well, I don't suppose there is any harm trying.

Q. No. As a matter of fact, Mr. Ferdinand, you do not mean by that statement to indicate that the union could prevent—and by legal means at least—a discharge for cause in the building? A. Well, we would have to show good reasons why we throw the man out.

Q. Yes. Men have been discharged in the Arsenal Building, have they not? A. Yes.

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Q. For good cause? A. For good cause.

Q. And Spear & Company from time to time have recommended the discharge of men for good cause in the Arsenal Building; isn't that so? A. That is right.

Q. And have they not from time to time directed you in the hiring of particular people in the Arsenal Building? A. Well, as I said before, they did furnish me with a few men.

Q. Yes. A. Some years back, and I told them that I didn't think it was the right thing to do.

Q. But you still accept those men? A. No, I don't.

Q. You are more or less an independent employee by reason of your many years there? A. No, I wouldn't put it that way. I think I convinced them that it was not the proper thing to do.

513

Q. Yes. In other words, you recommended they take other action. Is that about what it amounts to? A. That they should not take advantage of the fact that they were sent there by those people.

Q. And not bow to your authority, is that about it? A. That is right.

Q. When there are any complaints to be taken up with the union about any employees of the Arsenal Building do you take them up or does Spear, & Company take

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*Defendants' Witness, Joseph Ferdinand, Cross*

them up with the union? A. Well, I don't take any grievances up at all. If a man isn't just right you throw him out and let the union worry about it.

Q. If a man isn't right you just throw him out? A. That is right.

Q. And sometimes the union excepts to the action taken by the building? A. That is right.

Q. And there is arbitration machinery set up to resolve such disputes, is there not? A. That is right.

515

Q. Did you have an arbitration at one time in that building involving a Mr. Halley? A. That is right.

Q. And he was a starter at that building, was he not? A. That is right.

Q. And there was some dispute concerning his replacement by an assistant starter and the pay that that man should receive, and so on and so forth; is that right? A. That is right.

Q. Who took that matter up with the union, you or Spear & Company? A. The union took it up with Spear & Company.

Q. That is right, and the matter was handled directly with Spear & Company, was it not? A. That is right.

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Q. Now, would you say then, as a recapitulation of what you just testified to, that labor policy in the building is determined by Spear & Company?

Mr. Bruce: Your Honor, I object to the recapitulation of what he means. The Court can make a recapitulation of the testimony.

The Court: Objection sustained.

Mr. Herwitz: Very good. I withdraw the question.

Q. Mr. Ferdinand, do you know whether the Arsenal Building Corporation was a signatory to this Meyer agreement that was entered into in February, 1942? A. No, sir.

*Defendants' Witness, Joseph Ferdinand, Cross*

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Q. You do not know that, do you? A. No.

Q. When you were hired by Spear & Company did you make your own arrangements with them as to the conditions of your own employment?

Mr. Bruce: Just a minute. The testimony was not that he was hired by Spear & Company but that he was hired by Mr. Henry Greenberg, was it not?

Mr. Herwitz: Well, we do not, either one of us, want to characterize it, and I will withdraw the question and put it in a form that won't cause us to debate.

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Q. When you were hired, and whoever hired you, whether it was Greenberg or Spear—

Mr. Bruce: Well, I object to the "or Spear." It was Greenberg. That is what he testified to.

Mr. Herwitz: Withdrawn altogether.

Q. I will ask you this: You are a member of a union, you say; is that right? A. That is right.

Q. Do you make your own arrangements with Spear & Company as to your hours of work? A. No, no, no. I don't believe any hours were given to me exactly, that is, on the pay roll I was booked at different times. I have 50 hours, 48 hours and now I have—I think it is 48 now.

519

Q. Is that what you work? A. Well, I am supposed to work those hours but I don't know whether I do or not.

Q. As to the pay that you received, Mr. Ferdinand, that is an arrangement that you have directly with your employer, do you not? A. That is right.

Q. The union did not make any arrangement for you, did they? A. No.

Q. And Local 164 is a party to these various agree-

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*Defendants' Witness, Joseph Ferdinand, Cross*

ments, such as the Meyer agreement and the McGrady agreement, is it not? A. Well, that I wouldn't know anything about.

Q. You wouldn't know anything about? Mr. Ferdinand, during the period 1939 to 1942, February to February, were there times when Meyer Greenberg, who was out because of sickness or holidays or something of that kind— A. He was out, yes, for a considerable length of time.

Q. What is that? A. He was out for a few months, I think.

521

Mr. Bruce: What was the period?

Mr. Herwitz: Well, there was one three-month period in 1939, later in the year, I think from November.

Q. I am not talking about the time when he was out for an extended period, which we know about. I am talking about whether there were any weeks when he was out one or two days in the course of a week. A. I would not know for sure.

Q. Well, there were, from time to time, employees who were absent? A. That is right.

522

Q. What was your custom in regard to making deductions for such absences? A. Well, they were deducted for the number of days they were out.

Q. Yes. How much money did you dock them per day? How did you arrive at the daily wage? A. Well, I would figure the amount of hours per week.

Q. Yes. A. And deduct the amount of hours per day.

Q. Yes, and in that way get the hourly rate? A. Yes.

Q. That that employee was working under? A. Yes.

Q. Is that correct? A. That is right.

Q. Now let us see. In the period from February, 1939, to August, 1940, the prescribed number of hours in the Arsenal Building was 47, was it not? A. That is right.

Q. Now, if an employee was absent during that period and you wanted to determine the amount of money that should be deducted from his weekly salary, do I understand that you would take his weekly salary, divide it by 47, and in that way determine his hourly wage and then multiply that hourly wage by the number of hours that he was absent in the course of the week and deduct that amount from the total weekly salary? A. That is right.

Mr. Herwitz: We served a subpoena upon you gentlemen for some records—Mr. Spear, I think.

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Mr. Bruce: Well, what do you want?

Mr. Herwitz: Pay roll records.

Mr. Bruce: We have the pay roll records. What period do you want?

Mr. Herwitz: Well, all of them.

Mr. Bruce: The one sheet that is in evidence was taken from this file, so that is missing from here (handing to Mr. Herwitz).

Mr. Herwitz: Rather than burdening the record too much, if we could have an opportunity overnight to examine these records we could probably confine our efforts to a few of them or a sampling of them.

525

Is that all right with you?

Mr. Bruce: Surely. You mean examine them here after court or examine them before court tomorrow?

Mr. Herwitz: Well, supposing we make arrangements.

Mr. Bruce: Yes.

Q. Do you have anything to do with the Arsenal Building Corporation? A. No, with the exception of making out the pay roll in their name.



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*Defendants' Witness, Joseph Ferdinand; Re-direct*

Q. Otherwise your only business is with Spear & Company? A. That is right.

Q. In the management and operation of this building? A. That is right.

Q. Is it not a fact that they do exercise control and direction and supervision of you and the other employees of that building? A. Yes, that is right.

Mr. Herwitz: That is all.

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Mr. Bruce: Your Honor, may I substitute for that original pay roll sheet, which is in evidence, a photostatic copy so that we can put them back in the record?

Mr. Herwitz: Yes, that is satisfactory.

(Photostat substituted in lieu of original.)

*Re-direct Examination by Mr. Bruce:*

Q. Mr. Ferdinand, just one question: Who is Mr. Schneck? A. He is one of the owners of the building, the Arsenal Building.

Q. Isn't he the president of the Arsenal Building Corporation? A. I believe he is.

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Q. Does he often discuss the problems of the building with you as superintendent? A. Only pertaining to his floor as a tenant.

Q. I see. He is a tenant of the building? A. That is right.

Mr. Bruce: That is all.

*Defendants' Witness, Melvin Brown, Cross.*

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New York, February 10, 1943;  
11 o'clock A. M.

Trial resumed.

The Court: Are you ready to proceed, gentlemen?

Mr. Bruce: Yes. My understanding is, your Honor, that Mr. Herwitz might want to cross examine Mr. Brown further.

Mr. Herwitz: May I inquire whether those documents I asked for are produced?

Mr. Bruce: There is only one other minute on the McGrady Agreement. I will give you that. December 19th (handing to Mr. Herwitz).

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Mr. Herwitz: Mr. Brown.

MELVIN BROWN resumed the stand.

*Cross Examination continued by Mr. Herwitz:*

Q. Now, Mr. Brown, how many meetings took place between the association and the union prior to the McGrady Agreement? Do not include in these meetings the meetings at the Mayor's office. A. I don't know exactly, but I would say at least a half dozen.

531

Q. Yes. Now there have been produced here, Mr. Brown, certain minutes seeming to indicate that meetings were held on December 19, 1938, December 21, 1938, December 23, 1938, January 16, 1939, January 20, 1939, and January 18, 1939. Would you be able to say with any degree of certainty or assuredness that those were all the meetings that were held between the parties? A. No, I believe the contrary is true. I believe there were more meetings but Mr. Rawlins was ill and there were several meetings, I think, at which no minutes were taken.

Q. I have mentioned six—a half dozen meetings. A. I think there were more than that.

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*Defendants' Witness, Leon R. Spear, Direct*

Q. I understood you to say just before that there were about a half dozen. A. No, I said at least.

Q. I see, at least a half dozen? A. Yes.

Q. Can you tell us, if you recall, the date of any other meeting that took place between the parties? A. I believe there was a meeting on the 8th of January, Mr. Herwitz. Did you mention that date?

Q. No, I did not.

Mr. Bruce: What time are you asking for, Mr. Herwitz? What year?

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Mr. Herwitz: 1938-1939.

Mr. Bruce: The negotiation of the McGrady Agreement?

Mr. Herwitz: The negotiation of the McGrady Agreement, yes.

Q. You believe there was a meeting on January 8th? A. 1939.

Q. And any other day that you believe a meeting took place? A. Not that I can identify by date.

Q. I suppose that even as to January 8 you are somewhat vague about that? A. No. I happen to have seen a minute this morning—well not a minute but a notice calling the meeting for January 8th.

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Q. For January 8th? A. Yes.

Mr. Herwitz: I have no further questions.

Mr. Bruce: No further questions.

Mr. Bruce: Mr. Spear, please.

LEON R. SPEAR, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

*Direct Examination by Mr. Bruce:*

Q. Mr. Spear, you are an officer of Spear & Co., Inc., are you not? A. Yes, sir.

*Defendants' Witness, Leon R. Spear, Direct*

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Q. What officer? A. Vice president.

Q. And how long have you held that position? A. About 20 years.

Q. Where is the main office of Spear & Company, Inc.? A. 225 Fifth Avenue.

Q. You have a branch office at No. 463 Seventh Avenue, the Arsenal Building, do you not? A. Yes.

Q. Your concern, Spear & Co., Inc., is the managing agent of the Arsenal Building, is that correct? A. Yes, sir.

Q. Will you tell us what the purpose of the office at 463 Seventh Avenue is, please? A. It is purely a renting office where we have eight or nine men who confine their activities to renting space in the entire garment area.

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Q. Are you managing agents, as Spear & Co., Inc., for other buildings in the garment area? A. Yes, sir.

Q. Approximately how many buildings other than the Arsenal Building itself do you manage in the garment area? A. About 18 or 20.

Q. And the staff that has its office at the Arsenal Building services those buildings? A. Purely the renting:

Q. Purely the renting? A. Yes.

Q. How many men do you have in that office? A. At one time we had 12. We have about 8 now.

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Q. Does Spear & Co., Inc., act as managing agent for other buildings in New York City? A. Yes, sir.

Q. Approximately how many buildings would you say you averaged as managing agent during the period 1938-1942? A. Around 100.

Q. And as managing agent of those 100 buildings did you perform substantially the same agency functions that you do and did during that period in the Arsenal Building? A. Yes, sir.

Q. So that under Mr. Herwitz's contention you would be the employer in about 100 buildings during that time, would you not?

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*Defendants' Witness, Leon R. Spear, Direct*

Mr. Herwitz: I move to—I object to that question, the form of it.

The Court: That objection is sustained.

Q. Mr. Spear, does Spear & Co., Inc., have any financial interest in the Arsenal Building Corporation, owner of 463 Seventh Avenue? A. No, sir.

Q. Do you personally have any financial interest in it? A. No, sir. Neither I nor anybody associated with Spear & Co. in any form or fashion have any interest, not only in the Arsenal Building Corporation but in any piece of real estate in the City of New York.

Q. You are, however, the secretary of the Arsenal Building Corporation, are you not? A. Yes, sir.

Q. Can you tell me for what purpose you are secretary? A. Well, it is purely a matter of convenience. It saves the trouble of the main officers from having to go to court and answer to violations of rules and regulations of the City departments on notification, and as a matter of convenience they appointed me the secretary to avoid their having to be bothered with it.

Q. Who are the other officers of the Arsenal Building Corporation? A. There is a Mr. Max Schneck, who is the president; Mr. Aaron Rabinowitz, who is the treasurer, and a Miss Baum, I think her name is, vice president.

Q. Do any of those people have any financial interest in Spear & Co., Inc.? A. No, sir.

Q. During the period since 1934 when Local 32-B organized the building service industry in New York City have you been a member of the labor negotiating committee of the Midtown and Penn Zone Associations? A. Yes, sir.

Q. And as such have you attended substantially all of the meetings which led to negotiation of the various collective bargaining contracts between Local 32-B and the Midtown and Penn Zone Associations? A. Yes, sir.

Q. You may not have attended all of them but you

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*Defendants' Witness, Leon R. Spear, Direct*

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believe you attended most of those meetings? A. I think I attended all of them. I think so. I don't remember missing any of them.

Q. You have been in court, have you not, during Mr. Brown's testimony yesterday and this morning? A. Yes, sir.

Q. And you heard Mr. Brown's testimony with respect to the events and conversations that took place between the union negotiators and the employer negotiators at those meetings, particularly in reference to the negotiation of the McGrady Agreement in February, 1939?

A. Yes, sir.

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Q. Are you substantially in agreement with Mr. Brown as to what occurred at those meetings?

Mr. Herwitz: I object to that question, your Honor.

The Court: The objection is sustained.

Mr. Herwitz: If your Honor please, I meant at the conclusion of Mr. Brown's testimony to make a formal motion to strike it out. May I enter that motion on the record?

The Court: Yes.

Mr. Herwitz: On the grounds previously urged.

The Court: Yes. I will deny that motion now.

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Mr. Herwitz: Yes, sir.

The Court: And exception is noted.

Mr. Herwitz: Thank you, your Honor.

Q. Do you recall when the negotiations began looking toward what you now know as the McGrady Agreement, Mr. Spear? A. Yes.

Q. When? A. Sometime in December, 1938.

Q. And who were the members of your negotiating committee? A. Mr. Melvin Brown, Mr. Lawrence D. Mayer and myself.

Q. And were you represented by counsel in those meetings? A. Yes, sir.

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*Defendants' Witness, Leon R. Spear, Direct*

Q. Who was your counsel? A. Mr. Walter Gordon Merritt and assisting him was Mr. Clifton.

Q. Who represented the union in those negotiations? A. Counsel?

Q. No, what individuals, officers of the union. A. There was Mr. Bambrick, Mr. Sullivan, Mr. Severino, Mr. Hareckham, Mr. Shortman, Mr. Maguire, the attorney, and a group of others who were sometimes referred to as the scale committee.

545

Q. Do you recall the names of any of those men? A. Mr. Young was there.

Q. That is the Mr. Young who was on the stand here yesterday? A. Yes, and several others. I don't remember their names. At times there were as many as 15 or 18 men in that room.

Q. Approximately how many meetings would you say were held during December, 1938, and January and February, 1939, looking towards a negotiated agreement to replace the Mahoney Agreement? Just approximately how many? A. I don't know exactly but I would say 8 or 10 meetings. Of course there were other meetings in the Mayor's office and in the Borough President's office.

546

Q. I meant just meetings between the negotiating committees themselves. Do you recall the dates of those meetings? A. No, I don't but I have heard some of the dates this morning.

Q. Will you examine these exhibits and see if these refresh your recollection as to the dates of meetings that you attended.

Mr. Bruce: You did not offer that last one in evidence that I handed you?

Mr. Herwitz: No.

Mr. Bruce: I will offer that in evidence, too, so long as you have the others in. Do you want to offer it as part of yours yesterday so that they all bear the same serial number?

Mr. Herwitz: No.

*Defendants' Witness, Leon R. Spear, Direct*

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Mr. Bruce: Then I will offer it.

(Marked Defendants' Exhibit I.)

The Court: What date is that?

Mr. Bruce: The minutes of a meeting of December 19, 1938.

A. Well, I find I am marked "present" at all of them (examining)—yes, I am marked "present" at all of those.

Q. Referring to Plaintiff's Exhibits 7 to 11 inclusive, and Defendants' Exhibit I, do you recall, Mr. Spear, whether or not there was any discussion at any of those meetings of the Federal Wage and Hour Law? A. Yes. 548

Mr. Herwitz: If your Honor please, I am objecting to this entire line of questioning on the grounds previously stated.

The Court: Objection overruled.

Mr. Herwitz: Exception.

Q. Will you tell us to the best of your recollection, identifying as well as you can, as well as you can recall the people who discussed the Federal Wage and Hour Law at those meetings and what they said at those meetings—

Mr. Herwitz: I object to that.

549

Q.—and try to tell us as best as you can so that Mr. Herwitz can identify these people and places.

Mr. Herwitz: Well, I object to the form of that question, your Honor, because from the form of the question one cannot determine the answer that one is going to get as to the place. I do not like to tell Mr. Bruce how to put his questions, but I think he should specify the period or the meeting he is asking about.

The Court: I think you could designate it a little more definitely than you have, Mr. Bruce.

Mr. Bruce: All right, I withdraw the question.

550

*Defendants' Witness, Leon R. Spear, Direct*

Q. Where were these meetings held in December, 1938, and January and February, 1939, Mr. Spear? A. They started, I think, in a room in the Garment Center Capitol.

Q. And you say there was a discussion of the Federal Wage and Hour Law? A. Yes.

Q. By those present?

Mr. Herwitz: I object to that and move to strike it out. It is not identified.

The Court: I could not hear it.

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Mr. Herwitz: The question was, "You say there was a discussion of the Federal Wage and Hour Law?"

Mr. Bruce: That is just a preliminary question.

Mr. Herwitz: But he has not identified the time and place or the speaker.

Mr. Bruce: We have identified the time, your Honor. He has identified the time as being December, 1938, and January, 1939, at the Garment Center Capitol Club on several occasions.

Mr. Herwitz: He did not say "on several occasions."

The Court: Did you say that?

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The Witness: Yes.

The Court: On several occasions during those dates?

The Witness: Yes, sir.

The Court: Can you fix it any more definitely than that?

The Witness: Well, I am not very sure as to whether it was the first or second meeting.

Q. Well, take these minutes and examine them carefully and refresh your recollection as to the dates when you had discussions at this meeting (handing to witness).

Mr. Herwitz: I think he ought to answer your Honor's question.

The Court: Can you fix that any more definitely, without looking at the minutes to refresh your recollection?

The Witness: Well, I can fix it to this extent. I do not know whether it was the first or second meeting but very early in the original meetings there was considerable discussion in connection with the Wage and Hour Act. As a matter of fact, so much discussion both on the side of the union and on ours, between Mr. Maguire, Mr. Sullivan, Mr. Bambrick—I don't believe any of the others entered into that part of the discussion—and ourselves, that there was a period in one of those meetings that the discussion became so rife that both Mr. Maguire and Mr. Bambrick and Mr. Sullivan said, "Let's stop wasting time on that argument. We are not interested in the Federal thing at all. We don't apply; but let us get to the State proposition which we are particularly desirous of getting."

554

Now that happened, I think, at the first meeting and it might have been carried on into the second meeting, I am not sure, but I can remember very distinctly that Mr. Maguire, trying to specifically hurry the negotiations by saying to these men, "Now let us forget about this Federal thing. It isn't important; we are not interested. It does not cover us. Let us stick to what we want in the event that the State comes along," because at that time there had been some bill presented. "If the State changes things, that is what we would be interested in. That is where we would be affected."

555

Q. As a matter of fact the minutes which have been introduced in evidence of those meetings over that period refer to a possible State Wage and Hour Act, do they not?

Mr. Herwitz: I object to that—

A. Well, I haven't read them.

Mr. Herwitz: Wait. I object to that question, your Honor. The minutes speak for themselves.



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The Court: You should not object because the witness said he hasn't read them and does not know.

Mr. Herwitz: Very good.

Q. But the question of the State Wage and Hour Law discussion was referred to in it? A. Oh, yes. That was a topic of discussion right up to the day we met Mr. McGrady.

557 Q. Do you recall what the union's position was with respect to the passage of a State Wage and Hour Law? A. Yes, sir.

Q. Tell the Court what their position was. A. Well, their position was if the State were to pass a Wage and Hour Act affecting the employees in the building service they wanted whatever hours might be taken off or we would come to, be reduced to, that the wages that were paid to the individual should not be affected and that that number of hours would represent the amount of wages or rather the wages would represent that amount of money for the number of hours as legislated by any law that might be passed.

558 Q. What was the position of the employers' committee with regard to passage of a State Wage and Hour Law? A. Well, we were specifically for eliminating it entirely, that we were arranging a contract, whatever we had decided on or whatever our final contract would be for governing wages and hours would stand for the length of the contract and we held to that very steadily. Finally it became an issue and my recollection is that we finally agreed that if such a thing would happen, rather than have it become an automatic proposition, that we would sit down and talk the thing over and attempt, either by arbitration or somehow, to straighten it out if we could. I think it finally was settled by leaving it to Mr. McGrady to decide at the time that it might happen, to straighten us out on that proposition.

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Q. That was one of the points of difference that was left open after the Mayor's proposal in February, 1939, was it not? A. Yes, sir.

Q. And Mr. McGrady in his award, which is in evidence as Defendants' Exhibit F, settled that point of difference as to the clause which would go into the new contract, did he not? A. Yes, sir.

Q. And the parties wrote that clause as recommended by Mr. McGrady into the contract? A. Yes, sir.

Q. Do you recall what demand the union made with respect to hours in these negotiations leading up to the McGrady Agreement? A. Their request was 40 hours a week.

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Q. Had the union ever presented a demand for a 40-hour week before? A. Oh, yes.

Q. To your knowledge? A. Yes. As a matter of fact I think every demand they made at every session we had, or rather at the beginning of every session in connection with either the renewal or extension of the contracts, always had the 40-hour request.

Q. Do you recall whether or not they made a demand for a 40-hour week before Mr. George Alger as the arbitrator to the Extended Mahoney Agreement in February, 1938? A. Yes, sir.

561

Q. And that request was denied at that time, was it not? A. Yes, sir.

Q. Mr. Spear, what is the renting season of the Arsenal Building, the normal renting season? A. The renting season?

Q. Yes. A. Well, we begin to become active in renting in that district, beginning, as a rule, in the latter part of August on the larger leases—and when I say, "larger leases" I mean leases involving rentals of anywhere from \$6,000 up. We begin about the latter part of August and go right through full speed, right up to the 1st of February, which is the expiration date of all loft building leases in the City of New York.

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Q. So that you have a fixed period or term for your leases at the Arsenal Building corresponding to the general practice in New York City, the lease beginning February 1 of a given year and expiring on January 31 of a subsequent year; is that correct? A. Yes, sir.

Q. Are most of your leases on an annual basis? A. In the main, yes.

Q. But occasionally I suppose they run for a longer period? A. Yes. In large areas where the tenant has to spend a great deal of money in fixing up his plant, leases very often run for more than one year.

563

Q. Do you recall whether or not there were any leases in the Arsenal Building negotiated in February, 1939, or prior thereto for a longer period than one year? A. No, I don't, unless I got the records. I wouldn't know.

Mr. Herwitz: If your Honor please, I do not think that I have noted any objection heretofore to this line of questioning. This apparently relates to that part of the defendants' defenses on the question of estoppel, I believe, or equitable reformation. I wish to object at this time on the ground that it is incompetent, irrelevant and immaterial.

The Court: Yes.

564

Mr. Herwitz: And I take an exception.

Q. In negotiating leases with tenants of the Arsenal Building you do so as managing agent, do you not? A. Yes, sir.

Q. That is, Spear & Company does so? A. Yes, sir.

Q. And it is necessary for you, is it not, to determine what you will charge those tenants as rental?

Mr. Herwitz: If your Honor please, I object to leading the witness.

Mr. Bruce: That does not seem to be a very harmful question.

Mr. Herwitz: It seems to me, in view of the fact

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that that is a direct allegation contained in the answer, that it is more or less of a crucial question and I do not think he should be led on it.

The Court: Mr. Bruce, avoid, if you will, leading.

Mr. Bruce: I do not intend to lead, your Honor, and I would like to have the question read back.

The Court: Well, let us not read it back, because if you did not lead then you have done no harm.

Mr. Bruce: All right. Is the question to be answered?

The Court: You are now looking to the future. The question was not answered, was it?

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The Witness: No.

Mr. Herwitz: I do not think so.

The Court: Can you answer it?

The Witness: I would like to hear the question.

Q. (Read.) A. Yes.

Mr. Herwitz: Has your Honor ruled on that question?

The Court: I could not hear that.

(Question reread.)

567

The Court: Well, is there any doubt about that? It is a leading question but it seems hardly necessary to consider whether or not it is leading.

Mr. Herwitz: Very well.

Mr. Bruce: That was my reaction, your Honor. It was entirely harmless.. I did not mean to do any harm to Mr. Herwitz.

The Court: It is suggested, Mr. Bruce, that you avoid leading in the future because Mr. Herwitz thinks this is a rather important item.

Mr. Bruce: I do not mean to lead on anything. I do not believe I have led any witness on anything, whether it has been crucial at all.

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Q. What factors do you take into consideration in determining what rentals you will charge your tenants?

A. We take in the taxes, interest on the mortgage—

Q. You mean real estate taxes? A. Real estate taxes, all fixed charges, second mortgage interest in connection with this particular building—there happens to be one—the operating costs, wages, expenditures and so forth—everything that we might have as an expenditure for the coming year.

Q. And those items that you refer to constitute what you call your over-all expense? A. Gross operating cost.

569

Q. What percentage, approximately, of that over-all expense is made up by pay roll of building service employees?

Mr. Herwitz: If your Honor please, I have no desire to clutter the record, but I do object to the witness giving an approximation of what I consider irrelevant, but if relevant, unimportant. I feel if they intend to go into this entire question that they are obligated to put in the actual records of what the percentage actually is, not approximations.

570

The Court: I think they may get the figures from this witness, if he knows them.

Mr. Herwitz: Not general approximations, your Honor, without giving me the opportunity, virtually, of really testing the veracity or the accuracy of it.

The Court: Oh, yes, you will have a chance to see how he makes up his estimate. I think he may state his recollection of the estimated cost based on the facts. You will have plenty of opportunity to cross examine him to see whether his estimate is reliable, whether he is relying on the figures or not.

Mr. Herwitz: Exception.



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The Witness: May I answer?

The Court: Yes.

A. These percentages run, vary between 16 and 20 per cent.

Q. And that is the figure that you gave when you appeared as a Government witness in the case brought by the Wage and Hour Administrator against the Arsenal Building Corporation in 1941, is it not? A. Yes, sir.

Mr. Herwitz: I object, your Honor, to the form of that question.

The Court: I should think that objection was good. You are not trying to support his credibility, are you?

572

Mr. Bruce: Oh, no. I just wanted to show that this was, in the light of Mr. Herwitz's objection, the same figure that he testified to before when he was a Government witness.

Q. Before you determine your lease rentals each year do you make an estimate of your over-all expense for the rental year? A. Yes, as a rule we do.

Q. And it is your testimony that your labor cost covering the pay roll of building service employees runs from 16 per cent to 20 per cent? A. Yes, sir.

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Q. Of that estimate? A. Yes, sir.

Q. Does the competition of neighboring buildings in the garment center affect in any substantial way what you can derive from lease rentals in the Arsenal Building? A. Well, not only is there competition but you must understand the operation of renting in the garment area, regardless of what we might figure as our potential or estimated operating costs for the year, the renting of space in the garment district is determined by some very specific factors and we may be entirely off on what we actually get as against what our estimates are. For instance, we are dealing in the garment dis-

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strict with a very keen and shrewd buyer, a man who is, by nature of his own business, a very shrewd and keen buyer. They follow the movements in that area from the point of view of rentals, and things happening, as carefully as we do. It isn't an unusual happening that where one building in competition with others will make what is known, what we call a leader lease at a price which is way under what the space is worth, that within 24 hours the garment district, being the sieve that it is, it penetrates all around, and very often overnight will change from the very people you are dealing with the day before, so that the competition and the circumstances under which we have to operate in renting lofts in that area, more than in any other area in the United States—there is no set of rules governing competition in renting as there is in the garment area.

575

Q. Mr. Spear, most of the buildings that you are in competition with are signatory buildings under the so-called garment center collective bargaining contracts, are they not? A. Yes, sir.

Q. And observe the same labor standards that you do? A. Yes, sir.

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Mr. Herwitz: I object to that, your Honor.

The Court: Yes. That objection is sustained.

Mr. Herwitz: I move to strike out the answer.

The Court: Strike it out.

Mr. Bruce: We will consent to that.

Q. Taking into consideration all the factors that you have told us about that affect renting in the Arsenal Building it is a fact, is it not that as managing agent you endeavored to the full extent to meet the expenses of the building? A. Well, that is fundamental.

Q. In the negotiation of leases after October 24, 1938, and in determining the rental to be charged in those leases did you make any provision for the payment of overtime under the Federal Wage and Hour Law?

Mr. Herwitz: I object to that, your Honor, both as to form, as to substance, as to relevancy and materiality, and I believe it is also put perhaps in an unleading form but actually leading.

The Court: I should not think the question was leading. I think the question should be allowed.

Mr. Herwitz: Exception.

A. No, we did not make any provision for that at all.

Q. Will you tell the Court what factors affected your judgment in not making such provision? A. Well, our contract, our labor contract, the advice of counsel, the fact that everybody thought we included that an elevator man running passenger elevators on 35th Street and Seventh Avenue wouldn't be considered interstate commerce. We just didn't think there was anything to it, but that Act did not affect us at all. I mean we never thought that anything could be more local than a piece of property anchored into the ground at the corner of 35th Street and Seventh Avenue in the City of New York, could be construed or thought of as interstate.

Q. And those contracts that you considered as being a factor in your judgment on that question were the collective bargaining contracts that you had with Local 32-B? A. Yes, sir.

Q. The Extended Mahoney Agreement that was in effect on October 24th, 1938? A. Yes, sir.

Q. Which provided a 48-hour work week? A. Yes, sir.

Q. The McGrady Agreement which went into effect in February, 1939, which provided first a 47-hour work week and then a 46-hour work week? A. Yes, sir.

Q. Those are the contracts that you referred to? A. Yes, sir.

Q. As affecting your judgment in not making such provision? A. Yes, sir.

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Q. Under the Federal Wage and Hour Law? A. Yes, sir.

Q. Were there any other factors that you took into consideration? You have mentioned the contracts; you have mentioned legal advice as to not being under Federal jurisdiction in management of real property. Were there any other factors that affected your judgment? A. Well, the fact in the main generally that we just couldn't conceive, the fact that the Wage Law had passed would affect us at all, we never gave it a thought in setting up overtime as an expense.

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Q. Now, Mr. Spear, in March, 1940, the Federal Wage and Hour Administrator, Mr. Fleming, began an injunction action against the Arsenal Building Corporation and against Spear & Company, Inc., to restrain future violations of the Wage and Hour Law, did he not? A. Yes, sir.

Q. Having been sued by the Government under this statute did you thereafter in negotiating your leases, during the fall of 1940, for the renting season beginning on February 1, 1941, make any provision for overtime under the Federal Wage and Hour Law in your estimates of labor costs? A. No, sir.

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Q. And will you tell the Court what factors affected your judgment under those circumstances? A. Well, again we had a specific contract that called for specific wages for a period of time; the advice of counsel, of course, by that time, there had been a great deal of conversation about it.

Q. Conversation with whom? A. Conversation with—we had gone through some negotiations with the union and there was at least a feeling that the Federal Act did not apply to us. They were discounting it.

Mr. Herwitz: I certainly will have to object to that statement—

A. (Continuing) Those were my own reactions.

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Mr. Herwitz: —or the whole testimony that they were discounting it, as hearsay.

Mr. Bruce: We will consent to strike out "they were discounting it."

A. (Continuing) There were already, I think, some decisions in our favor of some local courts, I think.

Mr. Herwitz: What period is he talking about?

Mr. Bruce: We are talking about the period following March, 1940, up to February, 1941, when the leases for that period went into effect.

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Q. Do you recall that the Appellate Division of the Supreme Court of New York State in June, 1940, passed upon a Wage and Hour action? A. Yes. That was the case of the Garment Center Capitol where a watchman and the superintendent, I believe, had sued under the Wage and Hour Act and the Appellate Division said that they did not come into interstate commerce.

Q. And that suit involved a building— A. In the Garment Center Capitol, right in the garment area.

Q. And only about a block from your building? A. Yes, sir.

Q. The Arsenal Building? A. Yes, sir.

Q. And that Garment Center Capitol building is known to you, is it, the type of occupancy and the type of building? A. Oh, yes.

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Q. Is the building very much similar to the Arsenal Building Corporation building?

Mr. Herwitz: I object to that, your Honor.

The Court: I did not hear the question.

Q. (Read.)

Mr. Bruce: This is what happened: Mr. Spear testified that one of the factors he took into consideration after March, 1940, after the Government suit was started, was the fact that there had been



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court decisions holding that the building service employees were not under the Act, and he referred to a case decided by the Appellate Division in New York here involving the Garment Center Capitol building. I asked him where that building was located and he said it was about a block, I think, from this building. I asked him whether he had any knowledge of the character of the tenants in that building and then I asked him—and I think this is the question to which the objection was made—as to whether or not the building was substantially similar in character to the Arsenal Building.

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The Court: I think the objection should be sustained.

Q. You referred to negotiations with the union as being a factor in the exercise of your judgment on this question. What negotiations did you refer to? A. Well, that was—we had finished the McGrady Agreement.

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Q. In February, 1939? A. In February, 1939, and that agreement was in force in March, 1940, and it had a specific provision as to what we shall pay and for what period of time we shall pay, and it was, as far as we were concerned, a set proposition with the exception of the period when the reopening was to happen, which I think was in August, 1940.

Q. At any time prior to March, 1940, when the Government began the action against the Arsenal Building Corporation, had any employees of the Arsenal Building ever complained to you, or to your knowledge to any representative of Spear & Co., that they had not been paid overtime under the Federal Wage and Hour Law? A. No, sir.

Q. Were there any complaints made to you after March, 1940, by any of your employees up to June 1, 1942? A. No, sir.

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Q. And to the best of your knowledge were any complaints made to any representative of the Arsenal Building Corporation or of Spear & Company as managing agent? A. No, sir.

Q. During the period from October, 1938, up to June 1, 1942, was Spear & Co. furnished the signed pay rolls of the building by the superintendent, Mr. Ferdinand? A. Yes, sir.

Q. Did you get those pay rolls each week? A. Yes, sir.

Q. And Defendants' Exhibit H is a typical copy of the pay roll that Spear & Co. received each week, is it not (handing to witness)? A. Yes, sir.

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Q. And those pay rolls that you received each week for a period of more than three years after October, 1938, were required to be signed, were they not, by the employees in the building? A. Yes, sir.

Q. To your knowledge has the Arsenal Building Corporation operated at a profit or a loss during the fiscal year 1939-40, 1940-41, and 1941-42, if you know? A. I think the first two years of that period they operated at a loss before depreciation. I think the last year of that period they had a profit before depreciation. In other words, in that last year if you took the depreciation they would show a loss.

591

Mr. Herwitz: I am sorry; may I have the last question and answer read?

(Last question and answer read.)

Q. If the Arsenal Building Corporation is required to pay back overtime to October, 1938, plus liquidated damages, plus Mr. Herwitz's attorney fee, as a result of this action, would such payment have to come out of subsequent income of the Arsenal Building Corporation, that is, subsequent to February 5, 1942?

Mr. Herwitz: I object to the question not because the answer is not of course obvious but be-

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cause it is entirely irrelevant and immaterial and conclusory. I think at this time I ought to make some remark or objection to the continued reference to my counsel fees. I trust they won't completely break and bankrupt this building. I am beginning to get hopeful from the constant repetition of counsel.

Mr. Bruce: I haven't heard anybody except you mention your fees before in this case.

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Mr. Herwitz: I think the record will show the contrary, Mr. Bruce. I think this is the first time I have mentioned it.

Mr. Bruce: Oh no. You asked—

The Court: Well, go ahead, gentlemen.

Mr. Bruce: Do you object to the question?

Mr. Herwitz: I do.

Mr. Bruce: Is there a ruling on the question, your Honor?

The Court: I think the objection is on the ground that it is immaterial and on that ground I would overrule the objection.

594

Q. You may answer the question, Mr. Spear. A. They would either have to take it out of the subsequent rents or borrow the money to do it.

Q. Between October 24, 1938, and February 5, 1942, was there any provision in the leases of the Arsenal Building Corporation that would permit you to recover over against tenants of that period in the event that you were held liable for back overtime plus liquidated damages, plus Mr. Herwitz's attorney fees under the Federal Wage and Hour Law? A. No, sir. Those are specific contracts for certain sums and we cannot collect any more than the sums. As a matter of fact we are grateful to collect the sums that the leases call for.

Q. As a matter of fact, you occasionally have some bad debts, I suppose, arising out of those leases? A.

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Well, the casualty list and the casualties in the garment district is of a high percentage and always has been.

By Mr. Bruce:

Q. Mr. Spear, after the decision of the United States Supreme Court on June 1, 1942, did you have any requests from your employees for payment of back over-time under that decision? A. No, not directly afterward, no.

Q. Well, what did happen with respect to that decision? What did you do after that decision came down? A. Right after the decision or within that week—I go into that building eight or ten or twelve times a day and I meet the men as I go around and I would ask them what are they going to do about it, and every man had a different answer: He didn't know, he did not know what to do, and so forth. About three or four weeks after the decision was made, by that time we had been assigned a special representative from the Wage and Hour Division who spent his time exclusively in our office going over the figures of all of our buildings where the Wage and Hour Act might affect, and began working out the figures as to what these men would be entitled to under the Wage and Hour Act. They figured it on the basis of purely the straight time and a half.

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Q. By "they" you mean the Wage and Hour Division?

A. The Wage and Hour Division.

Mr. Herwitz: I move to strike out how the Wage and Hour Division figured it.

The Court: I was writing something, I did not hear it.

Mr. Bruce: Mr. Spear testified in substance that the Wage and Hour Division representatives went over the pay roll of the Arsenal Building Corporation and other buildings which Spear & Com-

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pany manage, and determined what the straight overtime was that was due, would be due under the Wage and Hour Law as a result of the decision of the Supreme Court. I think the thing that Mr. Herwitz objected to was the reference to the straight overtime, wasn't it?

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Mr. Herwitz: Mr. Spear said that the Wage and Hour Division, after the decision of the Supreme Court, figured the overtime that he owed to his employees on the basis of straight overtime without the liquidated damages—is that what you said?

The Witness: That is correct.

Mr. Herwitz: Well, I object to that because of the inference that might be drawn from it, to wit, that the Wage and Hour Division were passing any judgment on the amount of money that was due to these employees, and I think that this man should not be allowed to testify as to how the Wage and Hour Division figured or operated, or the mental operation of some employee of the Wage and Hour Division.

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Mr. Bruce: Well, will you stipulate that the Wage and Hour Division audited the pay roll of the Arsenal Building Corporation prior to July 31, 1942, and that the figures which are contained in the stipulation, Plaintiff's Exhibit 1 in evidence, are the figures which the Wage and Hour Division found to be due for overtime under the Wage and Hour Law for the employees in that building for the period from October 24, 1938, up to February 5, 1942?

Mr. Herwitz: Well, I have already—

Mr. Bruce: I think you have already stipulated that.



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Mr. Herwitz: No. I have already stipulated as to the amounts which each employee is entitled to. I do not know when the Wage and Hour Division examined the books. You tell me they did. I am willing to take your word that they did, but I do not think it is important to ascertain when they did. I cannot stipulate when they did it because I do not know. But I do not question the amount; there is no question about that.

Mr. Bruce: Well, we will withdraw the question and I will ask another question.

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Q. Did the Wage and Hour Division audit the pay roll of the Arsenal Building Corporation before July 31, 1942? A. Yes, sir.

Q. And following that audit what did the Arsenal Building Corporation do with respect to the employees in that building? A. I called in the shop steward.

Q. And who was the shop steward? A. Meyer Greenberg.

Q. Plaintiff in this case? A. Plaintiff in this case, and I said to him that we were ready to make a tender on the straight time and a half for the period and would he—

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Mr. Herwitz: Can you fix the date of this conversation?

The Witness: That conversation was sometime in July.

(To Mr. Bruce) When was this suit started? That will make me place it.

Mr. Herwitz: Was it before or after the suit?

The Witness: Before the suit.

Mr. Herwitz: Was it—

Mr. Bruce: Wait a minute. I am conducting this examination.

Mr. Herwitz: I beg your pardon.

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Q. Was this conversation with the plaintiff Meyer Greenberg before the action against your building was started by Mr. Herwitz? A. Yes, sir.

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Q. Tell us what that conversation was, please. A. I rode up in the elevator with him. He took me to my floor, and in going up I asked him—I told him that—I said I would like to see him in connection with the wage and hour situation, and he came up either the next day or the day after. I told him that we were—that we had now gotten our figures as to what they would be entitled to on a straight overtime—time and a half basis and that we were ready to pay all of the men that sum of money.

Q. Did you tell him that the Wage and Hour Division had audited the figures? A. Yes. I told him that the figures would be approved by the proper department, that the Wage and Hour people would not let the figures go out unless they approved them, and that as far as the sums were concerned, they would be correct. He said, "I will let you know in a few days."

If you let me know the date that we were served with the papers I will give you almost the very day that he came back.

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Mr. Bruce: Will you stipulate, Mr. Herwitz, that this action started on August 11 by the service of a summons and complaint?

Mr. Herwitz: If that is the date, I think it is, yes.

A. (Continuing) Well, then, I would say about July 28th, 29th or the 30th of July he came back to see me, and he said, "I have talked to all the men, we don't quite understand what we get. Will you explain it to me?"

I had at that time the figures of the Wage and Hour Division with me and I also had some receipts that had been signed, rather, the Wage and Hour Division receipt which they supply you with when you settle with an em-

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ployee, and I showed him exactly how we had paid a number of the other men in the Arsenal Building who had accepted settlement on that basis, and I explained to him exactly what they would get and he said, "Well, I understand it now and I'll let you know in a few days. After all, we don't want to go to court. We don't want to sue you. We would like to settle this thing. We would like to get it out of the way. Most of us have been here a long time. We are perfectly satisfied, and I will let you know in a few days."

Q. Did you tell him why you wanted to settle this claim? A. Well, I told him that the reason we were offering him exactly, him and the men exactly what we had offered in other buildings and where in the main it had been accepted in most of our buildings, the single overtime pay has been accepted and we have the receipts of the Wage and Hour Division signed by the men, the figures audited by the Wage and Hour Division, and it is a completed transaction. I showed him a number of them.

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Q. You explained to him the figures are audited by the Wage and Hour Division? A. Yes.

Q. What happened after that? A. He said, "Well, I will let you know in a few days."

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The Court: Who was this?

The Witness: This is Meyer Greenberg, the defendant.

Mr. Herwitz: The plaintiff.

The Witness: The plaintiff.

Mr. Herwitz: He is still the plaintiff.

The Witness: He is still the plaintiff.

He did not come to see me and I would hit his car—oh, I don't hit it every day because there are two cars that run to our office. The other three cars do not run, and he is very often shifted to these other cars so I wouldn't see him. Well, I hadn't seen him for three or

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four days and I asked him, "What are you doing about this?" and he said, "I will be up in a few days and tell you about it." And the next thing I know we were served with the papers.

Q. And that was on August 11? A. That was on August 11, 1940, and then he came to see me about the 15th or 16th.

Q. After the service of the summons? A. After the service of the summons and he said, "Mr. Spear, I want to apologize to you about the service. The suit," he said, 611 "we do not want to sue, but the union said if we don't, or else. I can't talk any more. I am sorry about it," period, and he walked out and I haven't talked to him about it since.

Mr. Bruce: That is all.

*Cross Examination by Mr. Herwitz:*

Q. Mr. Spear, you said that the next thing you knew was that you were served with a summons and complaint? A. That is right.

Q. And that was your first indication that you were 612 going to be served with a summons and complaint, is that right? A. Maybe not.

Q. What is that? A. Maybe it wasn't the actual moment of the service.

Q. Yes. A. But it was right—very shortly before that that I knew a suit was going to be started and that something was going to happen.

Q. Yes, and you were negotiating with Greenberg right up to the time that you were served with papers, is that right? A. I was not negotiating with him, as I recall.

Q. Well, as you have just described it. A. I explained to him what he wanted to know and what we were ready to do and what we had been doing all over the City.

Q. When was your first indication that Mr. Greenberg had a lawyer representing him? A. I think it was about three or four days or a week before, or five days before the action in this case.

Q. Did you talk to Mr. Greenberg after you learned that he was represented by counsel? A. Only after we were served with the papers. I never spoke to him—in that one period when he said "I'll see you in a few days," which was about ten days before, until he came up himself.

Q. Yes. A. About a week after we were served and he told me he was sorry about it.

Q. About ten days before you were served you had your last conversation with Greenberg? A. About ten days or thereabouts, or a week.

Q. And what was that last conversation that you had with him? A. The last conversation I had with Greenberg was when I came up in the car. I hit him that day, that is, I hit that car, rather, and I asked him "What are you doing about it?" and he says "I'll let you know in a few days." I didn't hear from him after that until he came to see me about a week or ten days after we were served.

Q. Did I understand you to say that after you saw Greenberg when you hit him in that car or hit his car—

A. When I walked into his car.

Q. —and you asked him "What are you going to do about it?", did I understand you to say before that the next thing you knew you were served with papers in the action? A. Yes.

Q. So that between the time that you asked Greenberg what he was going to do about it— A. Yes.

Q. —and the time you were served with the summons and complaint— A. Well, it wasn't only he. He was the shop steward speaking for the men.



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*Defendants' Witness, Leon R. Spear, Cross*

Q. Yes, but the next thing you know about it, so far as Greenberg was concerned, was that you were served with a complaint? A. No, I did not say that. I said I heard a rumbling that an attorney had been engaged.

Q. Yes. A. And then we were served with papers.

Q. Now you say you heard a rumbling. Didn't you have more than a rumbling about that, Mr. Spear? A. Well, no. If you knew the garment center like I do you will know that—you can't breathe, as a rule, without somebody in an hour coming out and knowing what you did.

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Q. Yes. There was no mystery about this, was there? A. There was a mystery as far as I was concerned.

Q. Was there? You mean before you were served with a summons and complaint in this action? A. Oh, no. I said there was a rumor around that an attorney had been engaged and we were going to be sued, and then I got the papers.

Q. And then you got the papers? A. Yes.

Q. As a matter of fact didn't your lawyer confer with me before you were served with the summons and complaint? A. I don't know whether he did or not.

Q. Didn't I notify you that I represented Meyer Greenberg and the other employees in that building? A. Perhaps.

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Q. And wasn't it before you were served with the summons and complaint in this action? A. It might have been.

Q. Now are you a little hazy about whether that is or is not so? A. Yes, I am.

Q. Is the rest of your testimony on this point— A. No, sir, my testimony in connection with my conversation with Greenberg I am very definite and specific about.

Q. Yes. May you be a little wrong about the dates? A. Well, I am sure of these definite dates. I am sure that a period, whether it was two weeks, ten days or

*Defendants' Witness, Leon R. Spear, Cross*

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three weeks before we were served with the papers, or whether before we knew you had an attorney, that Mr. Greenberg came up into my office and asked for an explanation of what these men were to receive. That I am positive of.

Q. In other words, before they went to a lawyer, Greenberg, the shop steward, asked you what you were going to do about the decision of the Supreme Court? A. That is probably so, yes.

Q. And at that time you told him that you were going to pay him the straight overtime, that's right? A. That is correct.

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Q. And did you show him the figures the first time he came to see you? A. Well, not the actual figures, no.

Q. No? A. But I quickly tried to figure out for him what he would get because he was one of the older employees.

Q. Yes. A. I said in the main that it would be about that.

Q. About how much did you say it would be? A. I don't remember what it was. It was something—I think in the neighborhood of \$200, something like that.

Q. In the neighborhood of \$200? A. Something like that.

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Q. And did you then offer him \$200? A. I offered to pay him specifically and any of the men or all of the men in the Arsenal Building the straight time and a half.

Q. Yes. A. For the period that they worked between October 24, 1938, and February 5, on this straight time and a half, and that those figures, before he would have to accept his check, would be verified, audited and approved by the Wage and Hour Division. I also told him that he would sign a receipt that was supplied to us by the Wage and Hour Division, copies of which I have right here in court.

Q. Yes. A. Now that I am specific about, in coming up to see me.

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Did you also— A. I am also specific about having spoken to him shortly after "What are you doing?"

Q. Yes. But you think you may be in error about the fact that he first came to you— A. I may be in error about whether the first time I knew was when I was served with the papers or not. I am trying to recollect whether he spoke to me or I had a conference or talk with you prior to that.

Q. Now, did you actually tender Mr. Greenberg any money? A. No.

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Q. Did you actually tell Mr. Greenberg how much you were offering him, exactly? A. Well, in this form: Exactly what the Wage and Hour Division would approve.

Q. No, but you did not say "I am offering you any specific amount"? A. No.

Q. You said that you would offer him his straight time without liquidated damages? A. That is right.

Q. As approved by the Wage and Hour Division? A. That is right.

Q. When it was approved? A. That is right.

Q. And isn't it a fact that at the time you had this conversation with Mr. Greenberg you did not know what figure you contended he was entitled to? A. They were 624 working on the sheets. As a matter of fact they were right in the midst of it. I have the sheets all here in court.

Q. Yes. A. You can see them, that they were worked on by the Wage and Hour Division.

Q. And when did the Wage and Hour Division conclude their examination and tell you how much you had to pay Greenberg? A. I don't know.

Q. Now you do not know whether that was before the suit was commenced or after it, do you? A. No.

Q. It might have been after it, might it? A. It might have.

*Defendants' Witness, Leon R. Spear, Cross*

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Q. So you could not have had this conversation as to the amount of money you would give to Mr. Greenberg if the audit was after that, could you? A. Oh, I could have specified exactly what he would get. That was a known quantity. That was something we did not have to guess at.

Q. You merely specified to Greenberg the principle under which you would pay him but not the amount, is that correct? A. The actual amount no, but since it is a known quantity, it isn't necessary to tell him you will receive \$208.32.

Q. I do not understand— A. That is a known quantity that can be figured out, checked by the proper authorities who had been having jurisdiction thereof and they have done it in every case, in every one—

Q. You have great confidence in the Wage and Hour Division? A. Well, up to now nobody has complained, who received the money.

Mr. Bruce: I move to strike that out, as to whether or not he has great confidence in the Wage and Hour Division.

Mr. Herwitz: If your Honor please, may I just point this out: I think that Mr. Bruce is entirely right when he states that it was entirely immaterial as to whether or not Mr. Spear has great confidence in the Wage and Hour Division, but in view of the fact that it was testified on direct by Mr. Spear that Mr. Spear relied completely on the fact that the Arsenal Building was not covered by the Wage and Hour Act, and apparently did not give any weight to the fact that the Wage and Hour Division did consider that the building was covered by the Act, I think I am entitled to ask him whether he did have such confidence in the Wage and Hour Division.

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*Defendants' Witness, Leon R. Spear, Cross*

The Witness: May I answer that?

Mr. Bruce: I think the explanation answers itself, your Honor. Mr. Herwitz now, by his personal testimony, is trying to establish that Mr. Spear should have known that the Arsenal Building was under the Act because the Government Department in March 1940 started a suit against him.

Mr. Herwitz: No, I did not say that.

Mr. Bruce: Well, that is putting it plainly.

Mr. Herwitz: No, I did not say that at all.

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The Court: Now, go ahead, gentlemen.

Mr. Herwitz: I will withdraw the question.

Q. Mr. Spear, I show you a copy of a letter addressed to Spear & Company and ask you to examine it and tell me whether Spear & Company received the original of it (handing to witness). A. (Examining) May I see it once again?

Q. (Handing letter to witness.) A. I am pretty sure. You said that we got it. I want to see who it is addressed to.

630

Mr. Bruce: We will stipulate, if you want to offer that in evidence, that that letter was received by Spear & Company.

Mr. Herwitz: I am not asking you. I am cross examining the witness.

Mr. Bruce: I thought you were offering it in evidence.

Mr. Herwitz: I am asking the witness a question.

The Witness: Yes, I imagine we did get it.

Q. Did you see it? A. I probably did. It is marked to my attention.

Mr. Herwitz: I offer this letter, a copy of this letter in evidence as Plaintiff's Exhibit 12.

(Marked Plaintiff's Exhibit 12.)



*Defendants' Witness, Leon R. Spear, Cross*

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The Court: What is the date of the letter?

The Clerk: July 31, 1942.

The Court: Is this letter, Mr. Herwitz, to Mr. Spear?

Mr. Herwitz: That is correct, your Honor.

I would like to read this brief letter into the record. It is addressed to "Spear & Company, Attention Mr. Leon Spear, Re 463 Seventh Avenue.

"Dear Sir: I have been retained by employees of 463 Seventh Avenue, in connection with their claims for overtime compensation under the Wage and Hour Law. On their behalf, I would like to discuss this matter with you at your earliest convenience.

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"Please be good enough to telephone me on receipt of this letter for the purpose of arranging for an appointment. Yours very truly."

Q. Now, Mr. Spear, I want to be sure. Let me see if I refresh your recollection—and correct me if I am wrong—isn't it a fact that I discussed the fact that I had been retained by the employees of the Arsenal Building with you before you were summoned and before you were served with a summons and complaint in this action? A. I don't remember. I do remember coming to your office with Mr. Newman.

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Q. Yes. A. What day that was I don't know.

Q. All right. That is what I am referring to. You did come to my office with your lawyer, did you not? A. Yes.

Q. Don't you now recall that was prior to the service of the summons and complaint? A. Well, there is where I may be somewhat confused, confusing the date of actually receiving the summons as the date having met you.

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Let me refresh your recollection— A. I am confused. In other words, when I was talking about prior periods, I might have been confusing, knowing about the case, having met you, gone to you, and confusing that with the date of the summons. That is possible.

Q. I see. Now just to refresh your recollection, do you not recall that you came to my office and that you and Mr. Newman asked me to withhold taking action on the case until Mr. Merritt returned from his vacation? A. That may be, that may be.

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Q. Does that tend to refresh your recollection? A. That may be.

Q. At the time that you came to my office you made no specific tender, did you? A. In your office?

Q. Yes. A. I told you exactly what I told Greenberg.

Q. Well, isn't it a fact that you told me—I may be wrong, Mr. Spear— A. I told you, exactly what I told Greenberg, that we would pay the men single time and a half. I told you exactly what I said to Mr. Greenberg, that we would pay the single time and a half, whatever that was, and that if you were asking for anything more that we were very sorry, you would have to start your case. You were never given any more offer than was given to Mr. Greenberg directly.

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Q. Oh, I understand that. The only question in my mind, Mr. Spear—and I don't want to match my word against yours because frankly I may not be sure about it, but it seems to me that you and your attorney made no offer except to ask me to wait until you had a chance to confer with Mr. Merritt. Now am I wrong about that? A. You may be absolutely right.

Q. I see. A. We talked about a lot of things. You probably are; maybe.

Q. All right. Now Mr. Spear, one of the tenants of the Arsenal Building is Max Schneck & Company? A. Yes, sir.

Q. And Max Schneck is the president of the Arsenal Building Corporation? A. Yes, sir.

Q. How much space does he occupy in that building?

A. He occupies a full floor.

Q. And how long has he occupied that? A. And half of another.

Q. How long has he occupied that much space? A. He has been in there, I should say, since about 1926. That would make it about 17 years.

Q. And how long is it that he has occupied the same amount of space? A. The amount of space he occupies now is about five years, I think.

638

Q. And is it the very same space that he has occupied for the past five years? A. No. He has had the one floor during the period but he has changed—at one time he had the tenth—he has the eleventh—at one time he had the tenth and then he switched to the twelfth, but in the last five years he has been occupying about a floor and a half.

Q. What rental does he pay for the space that he has in the building at the present time, Mr. Spear? A. Well, right this minute, he isn't paying any rental because he is away and I haven't negotiated a renewal with him.

Q. Well, would it be too much to ask you— A. I mean— 639

Mr. Bruce: Your Honor, I object to any question as to what Mr. Schneck is paying at this time. This lawsuit involves the period from October 24, 1938, up to February 5, unless Mr. Herwitz can show it is material.

Mr. Herwitz: I will connect it, your Honor. I do not think I should be required to exactly signal what I am getting at. I promise to connect it, your Honor.

The Court: I think under that assurance I should let you ask the question.

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*Defendants' Witness, Leon R. Spear, Cross*

Mr. Bruce: I withdraw my objection, then, on that assurance.

Q. What rent did he pay up to February 1 of this year? A. 1942?

Q. Yes. A. \$10,000.

Q. And what rental did he pay for the year 1941? A. I think \$10,000.

Q. Could you tell me how long he has been paying \$10,000? A. Of course I am relying completely on memory. I would imagine about three years.

641 Q. About three years? A. Yes.

Q. And before that how much did he pay? A. \$14,000.

Q. In other words, he got a reduction from \$14,000 to \$10,000, is that correct? A. That is correct.

Q. For the same amount of space? A. No. We took off a small unit on the east side of the loft in order to build a chute through from the 13th to the 12th floor.

Q. Well, was the reduction in the rent from \$14,000 to \$10,000 the result of giving him a less favorable space or was it— A. No, the space was the same, but you must understand that Mr. Schneck is a leader in this business and he is also a very keen and shrewd negotiator.

642 Q. I know Mr. Schneck. A. And that the rental that he pays would not be any criterion as to either what the value is or what we might want to do with other men like him, because the result of Mr. Schneck being in that building we probably get—have gotten about 15 or 18 tenants who want to be right at his doorstep. I do not know whether you understand how that operates. The leader is the man who brings the buyers into the building and there are a great many tenants who want to be right with this man so that they can get the benefit of these buyers. Now when you get leader, as I explained earlier in my testimony, there are all kinds of things you do to get them into the building, so that his rental would not be any basis or anything to, as I said, show the value of

*Defendants' Witness, Leon R. Spear, Cross*

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what a tenant or a landlord would like to do for Max Schneck if he could get him into another building.

Q. How long did Mr. Schneck pay \$14,000 for his space? A. I don't know, but I will say this, that he has paid in that building—he paid at one time thirty-odd thousand dollars.

Q. For the same space? A. For the same space.

Q. When was it that he paid \$30,000? A. Way back in 1929, 1928-1930, something in there. Well, he used to have two floors then.

Q. For the same space would you say that his rental has been going down? A. Yes.

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Q. Now is there another tenant in the building that occupies a large amount of space and who has been there for a considerable period of time? A. Yes. We have a firm called Max Wiesen. They have five and one-half floors in that building.

Q. And how much rent do they pay? A. At the present time? They pay \$55,000.

Q. And how much rental did they pay?

Mr. Bruce: What period, Mr. Herwitz?

Q. Well, are they paying more rent today than they used to under your lease? A. They are paying less.

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Q. Less. When did they pay more than they are paying now? A. About two years ago.

Q. And two years ago they got a reduction, is that right? A. Yes.

Q. What was their rent? A. They were paying \$57,500.

Q. And how long did they pay \$57,500? A. I think three years, I think.

Q. And before that what was their rental? A. Well, before that they weren't occupying the amount of space that they got when they paid \$57,500.

Q. I see. Do you have any other tenants in the building that have been there for an extended period of time and occupy any large amount of space? A. Yes.



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*Defendants' Witness, Leon R. Spear, Cross*

Q. Who? A. We have a firm called Kaplan & Elias.

Q. How long have they been in the building? A. About 15 years.

Q. And how much space do they occupy? A. They used to occupy a whole floor.

Q. And how much do they occupy now? A. A half floor.

Q. How long have they been occupying a half floor? A. About two years.

Q. Now what is their rental? What rent do they pay? A. Now?

Q. Yes. A. \$10,000.

Q. For the half floor? A. For the half.

Q. And have you renewed a lease with them? A. Yes.

Q. For this year, for the year 1943-1944? A. No, last year. It doesn't expire this year. It expires next.

Q. I see. And when did you make this lease with them? A. The one they are operating under now?

Q. Yes. A. In 1942—no, I made it in the fall of 1941 beginning as of 1942 and expiring on January 31, 1943.

Q. Has their rent been going up or down? A. No, their rent remains the same.

Q. Remains the same? A. No. I think when I made the lease with them I think it was a graduated lease of \$10,000 for one and \$11,000 for the second year. I think there is \$1,000 increase in the second year.

Q. How did that compare with the previous lease? A. Well, they used to pay for the whole floor. They paid as high as 26 or 27. They paid as low as 19 for the whole floor.

Q. So you are really giving it to them for two years for \$10,500? A. Yes, half a floor.

Q. Is that less than you used to charge in this building? A. It depends on what period you are speaking of.

Q. Well, let us say, three or four years ago. A. No, no. Well, the reason for the additional thousand dollars

*Defendants' Witness, Leon R. Spear, Cross*

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rental isn't rent. It is in consideration of having to do a great deal of work in there.

Q. I see. A. It was really their share towards this work that we added it on to the rent.

Q. What is the gross income of the Arsenal Building? A. Today?

Q. Yes. A. About \$350,000. It used to be \$660,000.

Q. Three hundred and how much? A. \$350,000. It is about 350 now. In 1931 it was 660.

Q. Between October 24, 1938, and February 3, 1942, would you give us an estimate of the total gross income of the Arsenal Building? A. I would have to travel entirely by memory.

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Q. In round numbers, Mr. Spear. A. In the last two years?

Q. From October 24, 1938, to February 3, 1942. A. Well, I will give you the figures as I think I remember them, but I won't be accurate—

Q. I am asking you that. A. I think in 1939—we have to go by the fiscal year February 1, 1939.

Q. Yes. A. I can't give it to you from October, 1938.

Q. Yes. A. I think the rental was around 327; I think so.

Q. \$327,000? A. Or 325. In 1940 I think we dropped to about 308. I know there was a drop of some eighteen or twenty thousand dollars because we had more vacancies.

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Q. Yes. A. Then I think in 1942 we went up to around 337, something like that.

The Court: What is the size of the Arsenal Building?

The Witness: It is a 22-story building on a plot 100 by 200, 20,000-square feet.

The Court: It is 100 on the avenue?

The Witness: 100 on the avenue and 200 on the street.

The Court: On 35th Street?

The Witness: Yes, sir, northeast corner.

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Now, that only would fix the rent for the three-year period from February 1, 1939, to February 1, 1942, is that right? A. No, no. It would be from February 1, 1939, to February 1, 1940.

Q. Yes. A. From February 1, 1940 to 1941, and from 1941 to 1942.

Q. That is right; that is three years? A. Yes, sir.

Q. Then I asked you also for the period from October 24, 1938 to February 3, 1939. That would be a period of three and one-half months. What is your estimate?

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A. Well, I don't remember that.

Q. In round numbers, would it be— A. It would be over \$300,000, somewhere. The gross rental—the annual rental would be something over 300. Now, how many thousand dollars over that I don't know. I don't remember.

Q. So that for the period for that three months you would estimate that the income, the gross income was about \$75,000, is that right? A. A quarter of 300, yes, sir.

Q. So that from October 24, 1938 to February 3, 1942, the gross income of the Arsenal Building would be approximately \$1,000,000, is that right? A. I imagine so.

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Q. Yes. Now, Meyer Greenberg, the plaintiff in this action—

Mr. Herwitz: What is the figure we have stipulated on for him?

Mr. Bruce: About \$200.

Mr. Herwitz: About \$200.

Q. Now, Meyer Greenberg, if he recovers in this action, will get about \$400, is that right? A. Yes, sir. I mean I am taking that figure. I always figured it was around the 200 mark.

Q. Yes. That \$400 figure, so far as Meyer Greenberg is concerned, is a relatively fractional part of the—

*Defendants' Witness, Leon R. Spear, Cross*

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• Mr. Bruce: Your Honor, I object to the form of this question before it is asked.

Mr. Herwitz: It is not good form to object when I am not finished with the question.

Mr. Bruce: I am sorry.

The Court: I cannot tell if you are objecting or not.

Mr. Bruce: I am sorry, I objected before the question was asked, so I will let Mr. Herwitz finish the question. He knows it is improper in form and he ought not to ask it.

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Q. Now, Mr. Greenberg's \$400 recovery is a fractional part of the gross income of this building from the point of view of your claim that you have been irrevocably harmed by Mr. Greenberg's action?

Mr. Bruce: Your Honor, I object to the form of that question.

The Court: I do not think it is necessary to ask that question. I think you are just taking up useless time because the Court sees the situation.

Q. Now, Mr. Spear, during this period of time when Max Schneck's rent was going down were labor costs going up or down? A. They were going up all the time.

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Q. Yes. A. Because our contracts were—every time we renewed a new contract there was an increase given.

Q. As a matter of fact, the amount of rent that you charge a tenant is as large as you can get, isn't it? A. I think so.

Q. Yes. I think you were on the committee, were you not, Mr. Spear, of the Realty Advisory Board that negotiated with Local 32-B on the reopening of the Sloan Agreement or contract in 1942? A. Well, I was not on the committee, no.

Q. Do you remember that you attended some sessions at the Mayor's office? A. The Sloan Agreement?

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Yes. A. Yes, I did. You mean in 1942?

Q. Yes. A. That is correct.

Q. And do you recall that at one of the meetings that you attended, Mr. Spear, that I very efroneously stated that if wages were increased that rents could be increased and absorb the wage increases? Do you remember my stating that?

Mr. Bruce: Your Honor, I object to the form of that question. Mr. Herwitz by that question is attempting to testify himself as an expert here.

Mr. Herwitz: I am asking him. He was present.

Mr. Bruce: I object to the form of the question.

The Court: What is the purpose of the question, Mr. Herwitz?

Mr. Herwitz: The purpose of the question, your Honor, is just this, that it is claimed in the answer that their lease rentals were fixed on the assumption that labor costs would be so much when as a matter of fact I want to show how much of an element that is in the fixing of labor costs.

The Court: I suppose that they would say that they are not alone in fixing the rents, that their rents have to be relative to the rents charged in other buildings, as well as their own. That is governed to some extent by the amount you have to pay for labor. I suppose that is the answer.

Mr. Herwitz: Your Honor, I think you are giving the answer, but I am asking him whether as a matter of fact the contrary was not stated in his presence, and isn't that the fact?

Mr. Bruce: Yes, but it was Mr. Herwitz who made the statement.

The Court: I do not see why you gentlemen discuss it. You forget sometimes that a Judge,

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*Defendants' Witness, Leon R. Spear, Cross*

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when he decides a case, understands something about it.

Mr. Herwitz: Your Honor—well, withdrawn.

Q. Let me ask you, Mr. Spear, this question: If labor costs go up, increased for all of the buildings in the garment center, is it your testimony and do you now state that that factor can be absorbed by increase of rentals of all the buildings in the garment center? A. Not necessarily so, no.

Q. Isn't it a fact that it cannot be absorbed unless there is sufficient demand to enable the landlords to charge more rentals for those buildings? A. Well, I think there are other factors that you must include. You must include the condition of the business of the tenant because that is one of the most important factors as to how prosperous our buildings can be over a given year. Remember that these people are in a star business. It fluctuates. If we get them in periods when they are doing a little business we can get a little more. If we get them in a bad time you take just what you can get. 662

Q. Isn't it a fact, Mr. Spear, that even if your labor costs were low, if you could get more from your tenants and make a higher profit you would do it? A. Well, I think so. That would be just good business if we could, but unfortunately in the garment district you cannot do it that way. It just doesn't operate that way. 663

Q. But if it did operate that way you would do it, wouldn't you? A. Well, of course. If you could make a little more profit—I mean we as agents are always attempting to get the most that the traffic will bear.

Q. Now, you do calculate the labor costs in the buildings you do operate? A. Yes, because it is a fixed charge.

Q. I did not ask you the reason. You do do it, don't you? A. Yes.

Q. But if after calculating labor costs of a particular building and in figuring out how much rent you must

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*Defendants' Witness, Leon R. Spear, Cross*

charge a tenant in order to meet those costs and make a profit, you still are unable to get a tenant to pay, that rent, what do you do? A. We absorb the loss.

665

Q. So that the fixing of a lease rental is entirely dependent on how much you can get for it from the tenant, isn't that so? A. Well, I wouldn't say that entirely. One of the things we try to do is to establish what is our daily operating cost. By that I mean every day we open the door to the front of the building, how much per square foot does it cost us? When we consider the interest, the taxes, the operating, the wages and everything that goes with it. There is a way in doing that. The reason we do that is that in our negotiations on specific leases we try to have an idea when a man gives us an offer whether it is an offer that we can afford to take from the point of view of not absorbing too great a loss or whether we can close the deal quickly, giving us a time sense in the closing of a lease.

Q. Isn't it a fact that the major factor in fixing lease rentals is competition? A. Competition is one of the great factors.

666

Q. I did not ask you whether it is one of the great factors. A. That is true, not only of the garment district but in any kind of a district.

Q. Yes, and isn't that the great factor? A. Not always, not always "the."

Q. In the last five years in the garment center hasn't that been the great factor? A. I would say that was a good factor, competition in that area is part of the business.

Q. Isn't it the great factor? A. I wouldn't say it is the great factor. It is a factor.

The Court: We will adjourn now until two o'clock, gentlemen.

(Recess to 2:00 P. M.)

Afternoon session.

LEON R. SPEAR, resumed the stand:

*Cross Examination continued by Mr. Herwitz:*

Mr. Herwitz: Will you let me have the last question and answer, please, Mr. Stenographer?  
(Record read.)

Q. Have rentals per square foot increased in the Arsenal Building in the past year? A. In the past year?

Q. Yes. A. They have remained about the same.

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Q. Have the labor costs in the Arsenal Building increased in the past year? A. Yes.

Q. By how much? A. 10 per cent.

Q. In the year prior to this last year, did the rental per square foot in the Arsenal Building increase? A. Somewhat. The rental per square foot did not increase. The occupancy increased somewhat.

Q. But the rental per square foot did not? A. No.

Q. Did the labor costs increase in that year? A. Yes.

Q. In the year before that—

Mr. Bruce: Your Honor, may I ask Mr. Herwitz just for the convenience of all of us to specify the years instead of saying "year before" and "the year before"? It is a little bit difficult to follow.

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Mr. Herwitz: Thank you.

Q. In the fiscal year 1940-41 did the rental per square foot in the Arsenal Building increase? A. When you say "1940-41," I just do not know what you mean.

Q. From February 1, 1940, to February 1, 1941. Did the rental per square foot in the Arsenal Building increase? A. No.

Q. For the fiscal year 1939-1940, that is, February 1, 1939, to February 1, 1940, did the rental per square foot increase in the Arsenal Building? A. When you say "increase" do you mean as against the year before?

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Yes. A. No.

Q. So that continuously since February 1, 1939, down to the present time the rental per square foot in the Arsenal Building has not increased? A. No, the rental per square foot has not increased. The occupancy may have increased.

Q. Yes. Now, during this same period, from February 1, 1939, to date, how much of an increase in labor cost have you had in the Arsenal Building? A. From 1939 to 1942.

671

Q. Yes. A. Well, are you including the Meyer Agreement?

Q. Yes. A. Well, there is a varied percentage because of the Wolff award.

Q. Approximately. A. And it has increased almost 15 per cent.

Q. During the time the labor cost has increased, there has not been any increase in the rental per square foot, is that correct? A. Not materially.

Q. Yes. A. By that I mean a particular unit, we might have gotten a little higher rate, but it might have been offset by another one.

Q. Yes. A. By that I mean another unit.

672

Q. What is the percentage of occupancy of the Arsenal Building at the present time? A. Today?

Q. Yes. A. I would say about 94 or 95 per cent.

Q. Is that more or less than it has been? A. That is a little more.

Q. How much more? A. About 4 per cent, 3 per cent.

Q. What does that mean in gross income? A. About \$10,000—ten or eleven thousand.

Q. In the past year. Now, has there been an increase of 4 per cent in the past year? A. No, not in the past year.

Q. Over how long a period? A. Over the last three years there has been an increase of about 6 per cent.

*Defendants' Witness, Leon R. Spear, Cross*

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Q. Do I understand that you and the management of the Arsenal Building have sought to have as high an income from that property as you possibly could obtain?

A. Yes, sir.

Q. The fact, for instance, that Mr. Schenck is the president of the Arsenal Building Corporation, and a tenant of the building in no way caused Spear & Company to give him rent any cheaper than an ordinary person or one not connected with the property would have paid? A. No, we treat him as a tenant.

Q. That is right. A. When it comes to the rental part.

Q. Yes, and would you say that you have obtained from the tenants as high a rental as you could obtain from them? A. Yes.

674

Q. Do I understand that you have rented out as much space in the building as you felt you profitably could rent out in the building in the past three years? A. We have attempted to rent everything.

Q. Yes. When you don't rent space in the building during the rental season is there somewhat of a reduction in the remaining space for the unrented space after the renting season is passed? A. You mean if a tenant comes along?

Q. Yes. A. Yes. The practice in the district is that when you are past your renting season, February 1, the price goes down or there is a concession made for a period of time up to the next fiscal year or the next February 1st.

675

Q. Would you say that you have obtained as much money from your tenants in the way of rent and rented out as much space in the building as you possibly could, within your power? A. Well, that is our business. We attempt and try to do everything we know and every skill we have to keep the building rented and get for it as much as we can from the point of view of dollars.

Q. Now, there is pending right now, is there not, Mr. Spear, a proceeding by Local 32-B seeking to obtain ad-



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*Defendants' Witness, Leon R. Spear, Cross*

ditional wage increases covering the buildings in the garment center, and the Arsenal Building as one of them? A. Yes. We have just finished an arbitration.

Q. In the event that the union obtains a favorable award, and if as a result of that favorable award the labor costs of the owners of the Arsenal Building and the employers should go up, is it your testimony that you would increase the rentals of the tenants in that building? A. We cannot increase that. The leases are set. They are made.

677

Q. And they are set for the next year? A. For the next year or two years or three years, depending on what the leases are.

Q. Yes. Now, in February, 1939, this McGrady Agreement was entered into—February 18, 1939, isn't that right? A. Yes, sir.

Q. At that time your leases for the fiscal year, February 1, 1939, to February 1, 1940, were already consummated? A. Yes, sir.

Q. Isn't that so? A. Yes.

Q. There was an increase as a result of the McGrady Agreement, was there not? A. An increase in what?

Q. Labor costs. A. Yes.

678

Q. But that increase in labor costs did not result in any increase in rentals the following year, did it?

Mr. Bruce: Specify the year.

Q. (Continuing) In the Arsenal Building, for the year 1940. A. I don't know whether it—well, I do not know whether—I don't remember whether the rents of 1940 were higher than 1939. I don't know.

Q. At any rate, the wage increase that resulted did not cause the rents to go up or down in that year, isn't that so? A. Well, we did know that we had an increased cost in labor, and in attempting to set our rentals for 1940 we had taken it into consideration.

Q. Yes. The year 1937 was a pretty good year, wasn't it, Mr. Spear? A. Part of it.

Q. Isn't it a fact that your rentals are governed a great deal by business conditions generally? A. Well, I think that is generally true of all businesses.

Q. Yes, and rentals go up in good years and they go down in bad years, isn't that so? A. As a rule, yes.

Q. It makes no difference whether wages go up or down in those years, isn't that so? A. Well, the tenant that you are negotiating with isn't interested in whether your wages are up or down.

680

Q. Now, Mr. Spear, you said you attended all of these negotiating meetings leading up to the McGrady Agreement, is that correct? A. Yes, sir, I think I was at all of them.

Q. And you also testified concerning statements made at these meetings, is that correct? A. Yes, sir.

Q. Mr. Spear, is your memory very good, clear, on the conversations that took place at these meetings? A. Well, they are clear with regard to certain things, yes.

Q. Yes. A. It isn't conceivable that I remember everything that is said when there are as many as 20 people all talking at once. I have the clear issues, the important issues, I think, and my memory is pretty good on that.

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Q. The unimportant issues it isn't so good on? A. Well, I cannot remember all the conversation in a room with 20 people, especially in talking and negotiating about a labor agreement. It is impossible to remember everything said by everybody.

Q. Yes, but the things that are more important you think you remember more clearly? A. I think so.

Q. Naturally so. Now, would you tell us, if you can, was it at the first meeting that these statements were made by Mr. Bambrick and Mr. Maguire and Mr. Sulli-

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*Defendants' Witness, Leon R. Spear, Cross*

van that you testified to this morning, about their opinion of the application or non-application of the Wage and Hour Law? A. I think I said this morning I wasn't sure whether it was the first or the second, but it was in one of the early meetings.

Q. The first or the second meeting? A. It was one of the early meetings.

Q. Can you tell us anything that happened at the first meeting? A. Specifically?

Q. Or generally. A. Well, normally the first meeting would be—

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Q. No, I am not asking you for "normally." Do you remember what happened at that first meeting? A. Well, I remember that we met.

Q. Yes. A. There was a lot of conversation back and forth.

Q. Yes. A. I am not sure whether the proposals in that particular case were presented at the first meeting or not, but we were presented proposals and then I think we adjourned, to be given a chance to read over the proposals and then I think we met again, with the idea of giving counter-proposals. Then there was a great deal of preliminary talk in connection with some of the demands—nothing official, just preliminary as you are glancing over them, and there might have been any one of a thousand things said by all the people who were sitting there. I can't remember all the conversation.

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Q. No, but what you remember specifically or generally is what you have just told us about? A. Yes. There may have been other things might have been said or might have happened, but as you talk about them I probably will remember them.

Q. All right. From what you remember of that first meeting you certainly cannot say now that these statements that you have referred to by Mr. Bambrick and Mr. Maguire and Mr. Sullivan were made at the first meeting? A. I said I wasn't sure whether those par-

*Defendants' Witness, Leon R. Spear, Cross*

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ticular discussions and statements were made in the first or the second meeting.

Q. Yes. Now, you have— A. I do say that there was a lot of discussion about the Federal Wage and Hour Act at one of those meetings, and the result of those discussions is what I told you this morning.

Q. Yes, I understand that, but I am trying to find out when, as nearly as possible, or if you know, these statements were made, and I ask you whether you would or would not say that it is your best recollection or it is not your best recollection that the statements were made at the first meeting. A. I couldn't say that with any specific yes or no, to say that they were. You must remember that all of those negotiations, that it was a very hectic period of negotiations and it is just not possible to expect three and a half or four years later to remember every word and everything said at any specific given meeting but as you go along the picture becomes clearer as you talk about it.

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Q. All right. Now will you look at Defendants' Exhibit I and tell us whether that refreshes your recollection as to what took place at the first meeting (handing to witness)?

Mr. Bruce: What date is that?

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Mr. Herwitz: December 19, 1938.

A. (After examining) Yes, I think so. I remember very specifically making this—having this conversation with Mr. Bambrick.

Q. Yes. From reading these minutes would that enable you to answer my question as to whether or not it was at the meeting of December 19 that these statements concerning the application of the Wage and Hour Law were made as you have testified, by Mr. Bambrick, Mr. Sullivan and Mr. Maguire? A. Well, I think you are missing one point in connection with using those minutes. Those minutes—

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Wait a second, Mr. Spear. I think that you can answer the question I have put to you—

Mr. Herwitz: And I ask the Judge to direct the witness to answer it.

Q. (Continuing) I think my question is clear. I am not missing any points.

Mr. Herwitz: Now, will you read him the question. I think the answer should be responsive.

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Q. (Read.) A. In spite of reading those minutes, there is no reference to these conversations—

Mr. Herwitz: If your Honor please, I merely—

The Court: I think the answer should be yes or no.

Mr. Herwitz: Yes.

A. I will say this, that the conversations could have been had just the same.

The Court: I understand the question is whether or not having looked at these minutes you can refresh your recollection sufficiently to answer Mr. Herwitz's question.

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Does it?

Q. Does it or does it not refresh your recollection?  
A. Not from reading those very minutes.

Q. All right. That is all I asked you. Just to make it clear, Mr. Spear, you do not have any independent recollection that it came up at that first meeting, do you? Yes or no? I think you can answer that. A. No. I have kept saying that I did not know whether it was the first or the second but it was in one of the earlier meetings.

Q. That is all. You have no independent recollection that it was at the first meeting that this conversation took place? A. No.

Q. And the minutes that I have shown you contain nothing that refer to the Wage and Hour Law?



*Defendants' Witness, Leon R. Spear, Cross*

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Mr. Bruce: I object to that, your Honor. The minutes speak for themselves. They are in evidence.

Mr. Herwitz: If your Honor please, I would just like to make a point. It is true the minutes speak for themselves but it may be that there is something in these minutes that this witness, who was present, might consider to be a reference to what he now testifies to.

The Court: I think he can answer that question.

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Mr. Herwitz: Yes.

Mr. Bruce: Exception.

Mr. Herwitz: Would you read the question.

Q. (Read.) A. No.

Q. Do you remember, Mr. Spear, what took place at the second meeting— A. Specifically no.

Q.—on December 23, I think it was?

Mr. Bruce: No.

Mr. Herwitz: The 21st?

Mr. Bruce: It is on December 21st.

Q. On December 21st. A. No, not specifically.

Q. Was Mr. Melvin Brown the spokesman for the group? A. No.

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Q. Wasn't he the chief spokesman for the group? A. No, not at all. We had no chief spokesman.

Q. Didn't he do most of the talking? A. No, not at all.

Q. Do you recall at the second meeting on December 21st that it was decided by the parties that there should be no extended discussion of wages and hours? A. I would not know that specifically. I mean I could not spot it at that particular minute or that particular meeting, no.

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*Defendants' Witness, Leon R. Spear, Cross*

Q. You don't remember that at all, do you? A. Well, I have—please remember that in a negotiation of a labor contract you get your complete, major picture and you give it the thought and the consideration that you have at the time, and you can't go back to any specific moment in any one of a dozen conferences and say at that particular moment did somebody say something.

Q. All right. A. It is just impossible.

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Q. Yes, I agree with you. Then would you say at the early conferences, the initial conferences that it was decided by the parties that it would be futile to discuss wages and hours? A. From what theory, futile from what, just wages and hours in connection with the renewal of the contract?

Q. Yes, yes. A. Well, that conversation could very easily have been had because the demands were so out of gear that it would be foolish or futile to talk about them.

Q. I am not asking you to pass upon the correctness of the statements, Mr. Spear, that were made at those conferences. I am asking you whether you remember that such statements were made, in substance? A. They probably were.

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Q. I am not interested in "probably." A. They could very easily have been made.

Q. I am asking you whether you remember it, Mr. Spear. A. Well, I am saying this, that I just cannot—it is inconceivable to expect anyone to remember every given conversation of a meeting or one of a series of meetings with 20 people in a room as to who or what minute anybody said any one thing.

Q. Mr. Spear, you weren't quite as dogmatic about your inability to remember what took place at these meetings this morning.

Mr. Bruce: Your Honor, I object to characterizing the witness.

Mr. Herwitz: Cross examination, your Honor.

Q. Well, I am asking you not about any specific meeting; as to the early meetings, the first few meetings.

A. Yes.

Q. Is it not a fact that it was said by the parties that it would be futile to discuss wages and hours? A. Yes, I think that was said.

Q. Yes, and as a result of the statement that it was futile isn't it a fact that that part of the demands of the union were elided and not discussed? A. At that particular meeting?

Q. Well, yes. A. It is very possible.

Q. And isn't it a fact that wages and hours were not discussed at the first and the second meetings? A. Yes, because I remember the procedure now. If I am not mistaken we got about 21 pages of requests, of demands, and if I am not mistaken we decided that we would leave the question of wages and hours to the end and see if we couldn't agree on as much of the other items of working conditions and over-alls and tools and stuff of that type before we tackled the wages and hours demand—a long series of demands. If I am not mistaken I think there were about 21 pages.

Q. I think you are right. Was anything said at the first or the second meeting, as far as you can now recall, by union representatives to the effect that they were more interested in a reduction of hours than they were in the increase in pay? A. It is possible that that was said.

Q. Now I know all of these things are possible, Mr. Spear. I am asking you whether you remember it. A. Yes, I do remember them making—I don't know just who made the statement—of somebody saying that they would like to have the hours reduced.

Q. That isn't the question or exactly in the form I put it to you. Don't you remember that it was said in substance, the fact that the union was more interested in

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*Defendants' Witness, Leon R. Spear, Cross*

hour reduction than in wage increase? A. Well, I don't remember that it was specifically put that way but I do remember that somebody or some number of somebodys saying something about reduction in hours.

Q. Can you identify the person who made the statement? A. Well, it would be one of three people. It would be either Mr. Bambrick or Mr. Maguire or Mr. Sullivan, who were the main spokesmen, with Mr. Hareham and Mr. Shortman every once in a while chipping in.

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Q. You do not remember— A. In the main it would be one of the three.

Q. Yes, but I am not asking you who it would be, Mr. Spear. I am asking you do you remember who made the statement. A. Well, I don't know who but it would be one of the three.

Q. That is your guess, is it? A. I don't remember which one.

Q. You don't remember? A. No.

Q. You said that the statement about the wages and hours was made by one of these three? A. By all of them.

Q. Oh, that you remember? A. Yes.

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Q. And that all of them said it? A. Yes, because that was disposed of and we forgot about it. I mean the question of the Federal Wage and Hour was something that was discussed. It was spoken about and then discarded.

Q. Wasn't that a matter of importance? A. They didn't think so at the time.

Q. Did you think so? A. Did we think so? No.

Q. But you remember specifically about that, don't you? A. Yes, sir.

Q. Do you remember whether it was Mr. Bambrick who made the statement about the union being more

interested in the reduction in hours than in the increase in pay? A. No, I don't remember whether it was him.

Q. Well, let me read from Exhibit 7 and ask you whether it refreshes your recollection. This is under No. 2, "Wages and Hours."

"There was some discussion relative to this item, during which Mr. Bambrick stated that at the meeting of the union's membership he had asked the men whether they were interested more in wage increases or in reduced hours and that seemingly the overwhelming answer was the men wanted the hours reduced; that of course they would like to get both increased wages and reduced hours but if a choice had to be made they were more interested in reduced hours."

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Does that refresh your recollection as to the fact that such a statement was made by Mr. Bambrick at that meeting? A. Well, I would say this, that if Mr. Rawlins has it in those minutes the chances are that it happened.

Q. I am not asking you about "the chances"— A. That Mr. Bambrick said it.

Q. I asked you— A. I am willing to agree that Mr. Bambrick said it.

Q. No, I am not asking you whether you will agree that Mr. Bambrick said it. I asked you whether you remember such a statement. A. I don't remember such a specific statement.

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Q. But you are willing to accept it as having been made? A. Yes.

Q. Is that right? A. Yes.

Q. As a matter of fact, wasn't it at the suggestion of the association that discussion of wages and hours was passed over? A. I think it was.

Q. Why? A. On the theory that there were so many demands, to see if we couldn't get rid of the other items and tackle the wages and hours last.



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*Defendants' Witness, Leon R. Spear, Cross*

Q. Does this refresh your recollection, that it was not for the reason that you give. I quote from Plaintiff's Exhibit 7:

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"Mr. Melvin Brown who acted as chief spokesman"—this is quoting—"for the owners stated that he thought this item"—that is, wages and hours—"should be passed over because in his opinion it was a matter which would have to be decided by arbitration. He said that conditions in the industry were very much worse than they had been a year ago and it simply was not in the wood to grant any demands which would result in increased operating costs and that a discussion of anything that involved extra expenses seemed to him to be futile because the owners could not accept such demands and that he was inclined to believe that the union representatives would not be willing to assume the responsibility of continuing the status quo."

Now, does that refresh your recollection as to what Mr. Brown said? A. Yes, I remember it very distinctly. The result of that was that we decided to take up the other items and see if we couldn't get those out of the way anyway.

708

Q. So at that meeting you did not discuss wages and hours, isn't that so? A. I don't think so.

Q. Now at the third meeting of December 23 did you discuss wages and hours? A. I don't remember specifically whether it was at that meeting.

Q. Does this refresh your recollection, reading from—

Mr. Bruce: Your Honor, I object to Mr. Herwitz refreshing the recollection without showing the witness these minutes. He has deliberately refrained from reading things that would refresh the recollection of this witness. He should show the witness, if the witness has no independent recollection—he should show him that and ask him whether his memory is refreshed.

*Defendants' Witness, Leon R. Spear, Cross*

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Mr. Herwitz: Do you want to examine him now?

Mr. Bruce: Oh, I will examine him in time.

The Court: Mr. Spear, are there some matters—

The Witness: Well, he is picking out certain specific things and asking me whether I remember one thing instead of letting me read the whole thing and give me the picture so that I can have it come back and visualize it.

The Court: If you simply state, "I can't remember, but I could recollect if I could look at the minutes to refresh my recollection"— 710

The Witness: Yes, sir.

The Court: —perhaps I should think that would be a satisfactory answer.

Mr. Herwitz: Yes.

Q. Is that your answer? A. Yes.

Q. Now, Mr. Spear, you testified this morning about these conferences, didn't you? A. Yes, I did.

Q. Before you testified did you examine these minutes? A. No.

Q. Was your memory as sufficiently vivid on what occurred at these negotiations so that you found it unnecessary to examine these minutes? A. It was sufficiently clear in connection as to what the conversations and the attitude and the disposition of the Federal Wage and Hour Act was. 711

Q. You are very, very vivid in your recollection about all matters referring to this case, aren't you? A. Yes, in connection with the questions you are asking me in connection with Federal Wage and Hour. That is a thing that is very clear. It was clear to everybody that was there.

Q. Now, I ask you whether at the third meeting that took place on December 23; that paragraphs 2 and 3 of

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*Defendants' Witness, Leon R. Spear, Cross*

the union's demands regarding increase in wages of 25 per cent, as demanded by the union, and the establishment of minimum wages for the three classes of buildings, were not discussed because it was stated at that meeting that such matters would have to be decided by mediation or arbitration, and that the owners were absolutely and positively in no position to make any concessions or offers which would result in increasing operating costs. Did that take place at that meeting? A. Yes.

713

Q. Do you recall, Mr. Spear, that there was no meeting during the Christmas holidays in that year? A. I think so.

Q. Do you recall that a meeting took place at the Garment Center Capital Club on January 16th or thereabouts? A. There was a meeting. I don't know the exact date.

Q. Isn't it a fact, Mr. Spear, that the question of wages and hours and its application to the employees involved in this dispute was raised by the employers? A. It might have been.

Q. Isn't it a fact— A. Sometimes.

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Q. Isn't it a fact that your group was exceedingly concerned with the possible application of the Wage and Hour Law to the employees involved in this contract?

A. No, I don't think they were—they were interested, of course.

Q. Yes. A. But I do not think they were exceedingly concerned about it.

Q. Isn't it a fact that you were exceedingly concerned but did all that was possible to hide that concern from the union negotiators? A. Well, I don't know what you mean by "hiding that concern."

Q. Well, if the parties had sat down at that negotiation with a Supreme Court decision, finding that these employees were covered by the Fair Labor Standards

Act, would you say that the bargaining position of the owners would have been less or more favorable?

Mr. Bruce: Your Honor, I object to a speculative situation which never happened. If they had sat down with a Supreme Court decision in 1938 this case would not be here.

Mr. Herwitz: It seems to me, your Honor, in view of the nature of this defense, which is more speculative than my question, that the question should be allowed.

Mr. Bruce: I agree that it should go out of the record.

Mr. Herwitz: I say the question should be allowed in view of the nature of the defense.

The Court: I think I had better have that question again.

Mr. Herwitz: Well, I will withdraw it, your Honor.

Q. Isn't it a fact that your side was concerned about the possibility of a State Wage and Hour Law being passed— A. Not concerned.

Q. —affecting these employees? A. But it was brought to their attention that it might happen.

Q. Isn't it a fact that you wanted to be protected in the event that such a thing occurred? A. Yes.

Q. And isn't it a fact also that the union's position was that they wanted to give you no protection in that regard? A. That is true.

Q. And if there was a reduction in hours as a result of the Wage and Hour Law they wanted to know the proportionate reduction of hours? A. You mean if a State Labor Law were—

Q. All right, let us take it only as to the State Labor Law. A. Yes, they wanted it automatically, the hours reduced and the pay remain the same.

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Yes. Is it your position or is it your testimony that the union took a different position in the event there was a reduction of hours as a result of the Federal?

A. They did not take a different position. They just did not believe, as we did not believe, that the Federal Act would govern, so they did not take any position.

Q. Do you think from those negotiations that they would have taken a definite position?

Mr. Bruce: Your Honor, I object to the "iffy" questions here.

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Mr. Herwitz: Oh, no. If your Honor please, the defense in this case is that if the parties had known that the Federal Fair Labor Standards Act had applied they would have made a different contract than the one they did.

Mr. Bruce: Read the question.

Mr. Herwitz: I am asking him about it.

Mr. Bruce: I may have misunderstood the question. Will you read the question, Mr. Stenographer, please.

Q. (Read.)

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Mr. Bruce: "They" meaning who?

Q. That the union would have taken a different position in the event that a reduction of hours was brought about by reason of the application of the Federal Fair Labor Standards Act. (A. Well, I think if they had felt that the Federal Wage and Hour Act had been applied to us they would have taken the position right there.

Q. That what? A. They would have taken a position that they wanted some protection on it, or something about it in the contract.

Q. In other words, they would have taken the same position— A. If they felt that the Federal Wage and Hour would apply to us at all.



*Defendants' Witness, Leon R. Spear, Cross*

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Q. That the union would have taken the same position as it did in regard to the State legislation— A. No, they specifically—

Q. Can't you let me finish my question? A. Yes. . .

Q. Now we will have to start over on this, Mr. Spear. You said before that the union's position was that in the event that there was a State Wage and Hour Law which limited hours that the union said that they did not want any proportionate reduction in pay with the reduction of hours; is that right? A. Yes.

Q. I now ask you, is it your position that the union would have taken a different position if there had been a reduction in hours as a result of the application of a Federal Wage and Hour Law? A. Are you speaking about 1939? 722

Q. Yes. A. And the negotiations of the McGrady contract? Yes, I think they would.

Q. Would have what? A. Would have taken a position and wanted a provision made in connection with the Federal Wage and Hour Act, which they did not.

Q. You mean they would have wanted a provision the same way as they wanted a provision in regard to a State Law? A. Yes, if they thought that the Federal Wage and Hour applied to us or that it meant anything in connection with a building in the City of New York. 723

Q. Yes. A. I think if they felt that way they would have taken a stronger position and would have asked for a specific—something in the contract to provide for it, as they did when the notification of the State Labor Board—of the possibility of a State—

Q. Law was raised? A. Law was raised.

Q. As a matter of fact, didn't the union take that position? A. I don't remember that they ever did.

Q. Will you deny—well, I withdraw that. That is too much to ask.

724

*Defendants' Witness, Leon R. Spear, Cross*

Will you say, Mr. Spear, that they did not take that position? A. I don't remember them ever taking a position in connection with the Federal Wage and Hour Act at the time of the negotiation of the McGrady Agreement.

Q. Now you were at all of these conferences, weren't you? A. Yes.

Q. And you were present before Mr. McGrady, were you not? A. Yes.

Q. You heard everything that was said by both sides? A. I think so.

725 Q. And that includes everything that was said before Mr. McGrady? A. Well, I don't say that I would remember everything that was said, no.

Q. Well, I didn't say that you would remember it unless I called your attention to it, but you were there, were you not? A. I was there.

Q. And you knew that both sides had submitted memoranda and so on, did you not? A. Yes.

Q. Now the union, as one of its proposals, wanted included in the contract this provision, did it not?

726 "If during the period hereof by any law the hours of employment are reduced below the hours provided for herein, then this Agreement shall be deemed to be and be amended to provide that hours of employment hereof, including relief periods, shall be as described by such law or laws, without any diminution of wage rates." That is what the union wanted included in that contract when the matter came on before Mr. McGrady, isn't that so? A. I think they did.

Q. Isn't that so? A. Well, is that in the original proposals? Are you talking about that?

—Q. I am quoting from Mr. McGrady's decision. A. (No answer.)

Q. Let me refresh your recollection, Mr. Spear—

*Defendants' Witness, Leon R. Spear, Cross*

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Mr. Bruce: Here is the decision (handing to Mr. Herwitz).

Mr. Herwitz: Have I quoted that correctly?

Mr. Bruce: No.

Mr. Herwitz: In what respect?

Mr. Bruce: You said "described" instead of "prescribed."

Mr. Herwitz: If I said "described" it should be "prescribed." Thank you, Mr. Bruce.

Q. I will show you this, Mr. Spear, and see whether it refreshes your recollection (handing to witness). A. Yes. That is—isn't that the memorandum that Mr. Maguire sent to Mr. McGrady? And there was also one sent—I remember that it was left with the two attorneys to send memorandums to Mr. McGrady, Mr. Maguire For the union and Mr. Merritt for the owners.

728

Q. Yes. A. Now what happened to those memorandums I don't know.

Q. Let me ask you something, Mr. Spear. Wasn't it the employer who first raised the question about being protected in the event of a State Wage and Hour Law?

A. Well, I don't know whether it was the employers or the union. I know there were these discussions about protection. The union submitted they wanted to be protected in the event of a State Law and I remember we decided—we said, "We won't put it in the way you want," and there was a long argument and I think it finally worked out that we would leave it to Mr. McGrady. I think that is the day it ended.

729

Q. See whether you can answer my question, Mr. Spear. A. And then there was some—

Q. See whether you can answer my question. Isn't it a fact that the employers were the ones who were concerned about the possible passage of a State Wage and Hour Law? A. I think we were concerned.

730

*Defendants' Witness, Leon R. Spear, Cross*

Q. And wasn't the concern your concern initially? A. I don't think so.

Q. Would you say as to your present answer that you might be subject to correction? A. I might be, yes.

Q. All right. I now show you the minutes of December 23, 1938, the second page thereof—this is Plaintiff's Exhibit 8—down at the bottom of the page, and I ask you to read that last item marked "No. 4" and tell me whether it tends to refresh your recollection (handing to witness)?

A. Well, I don't know what it means.

731

Q. Suppose I try to help you. A. (Examines.)

Q. Have you finished reading it? Now just so that the Court knows what we are talking about, and counsel, this reads: "4. Increases and reductions in wages and hours. The owners agree to this clause with the provision that it be subject to a clause that would cover the situation in the case of any statutory change which would compel adjustment." A. I still do not understand it.

Q. All right. Now we will try to help you out on that, Mr. Spear. Will you look at provision No. 4 of the proposals and read that (handing to witness). Read it out loud. A. "That provision No. 4 of the present agreement shall continue under such number."

732

Q. Yes. Now we will have to look for provision No. 4 in the present agreement.

Mr. Herwitz: May we have the Extended Mahoney agreement, please?

(Mr. Bruce hands document to Mr. Herwitz.)

Q. To refresh your recollection, Mr. Spear, the Extended Mahoney Agreement, Defendants' Exhibit A, read: "That during the period of this Agreement there shall be no reduction in wages nor an increase in hours provided for herein." A. That is No. 4.

Q. That is right. Now does that refresh your recollection? A. Yes.

*Defendants' Witness, Leon R. Spear, Cross*

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Q. In other words—and correct me if I am wrong—at this meeting of December 23—

Mr. Herwitz: Is that the date?

Mr. Bruce: December 23, 1938, that is correct.

Q. —the parties, the negotiating parties sat down and discussed each of the union's demands? A. Yes.

Q. The union's demand, referring to provision No. 4, was for the maintenance of the status quo. You have already seen that, Mr. Spear? A. Yes.

Q. In other words, the union wanted continued in the contract the clause that during the period of this agreement there shall be no reduction in wages nor an increase in hours provided for herein, is that right? A. That is right.

734

Q. Now we have been reading from these minutes that the owners agreed to this clause; in other words, you agreed to the continuance of the status quo, and then that the owners set up a provision, and it reads: "That the provision that it be subject to a clause that would cover the situation in the case of any statutory change which would compel adjustment." A. Well, I don't know what Mr. Rawlins meant by that. I yet do not understand, unless he was referring to the State Law that might have been passed. I don't know what he had in mind there at all.

735

Q. You mean it might also refer to the Federal Wage and Hour Law? A. No, that I am sure it did not.

Q. You are sure it did not? A. I don't know what Mr. Rawlins meant by that. It is his minutes and he wrote it, and I don't know.

Q. I notice in these proposals that I handed you there appears some writing. I ask you—do you know Mr. Rawlins? A. Yes.

Mr. Herwitz: Mr. Rawlins, will you stand up.  
(A man stands up.)



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*Defendants' Witness, Leon R. Spear, Cross*

Q. That is Mr. Rawlins? A. Yes.

Q. And he has been sitting in here throughout the entire trial? A. Yes, sir.

Q. And he is the one who took these minutes, is he not? A. Yes.

Q. Was it customary for him to read these minutes to the committee? A. No, it was not. He would send us a copy of it and, frankly, I would read them the next morning and file it.

737

Q. I see. And you have read all these minutes? A. At some time, yes. I mean when they were sent out.

Q. I suppose if you saw any error in them you would call them to his attention? A. Not particularly.

Q. Do you know his handwriting, Mr. Rawlins' handwriting? A. I am not sure.

Q. Would you see whether you recognize his handwriting contained in those proposals (handing to witness)? A. I am not sure it is. It probably is.

Mr. Herwitz: Is there any question about that?

Mr. Bruce: I don't know whose it is.

Mr. Herwitz: You wouldn't want to concede it, Mr. Bruce?

738

Mr. Bruce: I don't know whose it is.

Mr. Herwitz: You wouldn't want to find out across the courtroom if it was his handwriting?

Mr. Bruce: I do not know.

Mr. Herwitz: No? I ask Mr. Spear to step down so that I can call Mr. Rawlins.

The Court: Yes.

Mr. Bruce: Don't do that.

(To Mr. Rawlins): Is that your handwriting?

Mr. Rawlins: I think I can tell. Let me look at it (after examining). Sure.

Q. Now it says under this "O K, subject to a clause relating to change in statute, such as Wage and Hour Act." Is that right? A. That is what it says, yes.

Q. I will take your answer. Is it your understanding from being present at these negotiations that this clause which was to be inserted was for the protection of the employers or for the protection of the union? A. Of course I don't know what Mr. Rawlins meant by "Wage and Hour Act." You will have to ask him. I don't know what he meant by this. He is writing these minutes and he is writing these memorandums and I don't know what is in his mind when he wrote them.

Q. Well, you got the minutes, didn't you? A. Well yes, I got them, yes, but I told you I would read them and file them.

Q. Aside from what is in Mr. Rawlins' mind I am going to ask you now, is it your testimony, is it your statement that the employers or the union first raised the question of inserting some saving clause in the contract relating to a Wage and Hour Law? A. Well, my own recollection of it is that the employers had asked the protection—asked for a protective clause when the Wage and Hour Law under State Law was brought up, and that is that, what that refers to.

Q. All right. Would you agree with me that the employers considered it possible that there might be some State Wage and Hour Law? A. Well, there was a bill up at that time.

Q. Yes, and was that— A. And naturally it was possible.

Q. And was that considered by the employers during these negotiations? A. I think it probably was.

Q. In considering the possibility of such a law, did the employers think that it was necessary to have a clause in the contract relating to such future State legislation? A. Yes, after a long discussion of the State Law.

Q. Yes. Now, you say that that clause, which was suggested by the union, as contained in Mr. McGrady's decision, which I read you, does not refer to the Fed-

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*Defendants' Witness, Leon R. Spear, Cross*

eral Fair Labor Standards Act but refers to the State Fair Labor Standards Act or to a State Law? A. Well, that is my interpretation of it.

Q. That is your interpretation of it? A. Yes.

743

Q. According to your interpretation of it such a clause would have been necessary in the contract to protect the employers, would it not? A. Well, I thought I said before that there was a lot of discussion in connection with the fact that there might be a law passed in the state and that there was a great deal of discussion about that in the union insisting that if that State Law were passed they wanted it to act in their favor.

Q. But that is not the question I put to you, Mr. Spear. A. Now, my recollection and understanding of everything that went from then on in connection with Wage and Hour Act was the one that would always refer to the one that was possible in the State of New York.

Q. All right. We got that far. I am going to read this again to you and I am going to ask you what you think it means.

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Mr. Bruce: Well, let him read it instead of you reading it.

Mr. Herwitz: Now, I would like the Court to know—

The Witness: I would like to read it myself.

Mr. Bruce: All right, then read the whole thing. Read what Mr. McGrady said about it.

Mr. Herwitz: No, I won't do that, because I am testing the veracity of the witness and if you want to take him on re-direct, you may.

Mr. Bruce: I will.

Mr. Herwitz: Because I am certainly putting the veracity of this witness or the accuracy—I take back "veracity"—the accuracy of this wit-

ness in issue. I am testing it and I am entitled to do it.

Mr. Bruce: Well, I suggest instead of burdening the record with your reading it, let him read it and then answer your question.

Mr. Herwitz: I suggest that if you call him as a witness you should have let him read the minutes and anything it related to so that his memory was sufficiently refreshed so that he could be prepared while he was on cross.

Mr. Bruce: I knew you would do it for me.

Mr. Herwitz: I did not know that you had that confidence.

Now may I proceed?

Q. The union suggested this paragraph, did it not: "If during the period hereof, by any law the hours of employment are reduced below the hours provided for herein, then this agreement shall be deemed to be and be amended to provide that hours of employment hereof, including relief periods, shall be as prescribed by such a law or laws without any diminution of wage rates." The union wanted that clause in the contract, didn't it?  
A. Yes.

Q. Now, it is your testimony that it was your understanding that that referred to a State Wage and Hour Law? A. Yes, sir.

Q. If there had been a State Wage and Hour Law the employers would have wanted protection, isn't that so?  
A. If there had been one in existence?

Q. Or was going to be, during the life of the contract. A. Yes, I think so.

Q. And yet Mr. McGrady says—and I read you from Mr. McGrady's decision: "The parties differ as to the necessity for this paragraph." Do you remember that now? A. Yes.

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Is it your position that the association and the employers on one hand wanted to be protected in the event that there be any State legislation and, on the other hand, took the position that there was no necessity of having any clause in the contract dealing with State legislation or the possibilities thereof? A. I did not hear part of that question.

Q. (Read.)

749

Mr. Bruce: I suggest you break that question up in its component parts. I am sure I don't know what it means either.

Mr. Herwitz: Well, I do not think I wish to make it any more difficult for him than for the lawyer, so I will withdraw it.

Mr. Bruce: That is good.

Q. Isn't it a fact that the statement I have just read was the union's offer to put into the contract a clause, a clause referring not solely to State legislation but to Federal legislation, existing and in future? A. No, not according to my understanding of the negotiations and the things that happened.

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Q. Isn't it a fact that the arbitrator rejected the union's proposal and limited the contract to this provision: "In the event that legislation is enacted applicable to the employees in this industry," and he continues on—that the arbitrator by that clause limited it to State legislation?

A. Yes, because the Federal Act had already been in existence before this clause was put in.

Q. Mr. Spear— A. So he couldn't have meant anything but the State Law.

Q. Mr. Spear, didn't the union urge to the arbitrator that these employees might be covered by the Fair Labor Standards Act? A. Not in the Federal.

Q. And didn't Mr. Merritt, your attorney, say that they were not covered by the Federal— A. Well, I am sure that he said they were not covered.



*Defendants' Witness, Leon R. Spear, Cross*

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Q. And didn't the arbitrator therefore merely limit his decision in regard thereto to the State legislation?

Mr. Bruce: Your Honor, the arbitrator's decision speaks for itself and it speaks eloquently on this. It says the possibility may never arise.

Mr. Herwitz: Mr. Bruce and I agree on the eloquence of the arbitrator's decision.

The Court: We will take a short recess.

(Short recess.)

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By Mr. Herwitz:

Q. Mr. Spear, isn't it a fact that Mr. Maguire and Local 32-B—well not Mr. Maguire, but that Local 32-B made the following statement to Mr. McGrady with relation to this wage and hour clause in the contract—

Mr. Bruce: If he knows.

Mr. Herwitz: If he knows.

Q. (Continuing)—“Whatever the possibilities may be of there being a reduction of hours under the law”—

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Mr. Herwitz: You do not have to look over my shoulder, Mr. Bruce.

Mr. Bruce: Do you mind?

Mr. Herwitz: Yes, I do.

Mr. Bruce: Well, you saw my minutes yesterday. I thought maybe you would let me see yours.

Mr. Herwitz: When I am ready to put it in evidence I will show it to you.

Mr. Bruce: Fine! You will produce them without binding the Court.

Q. (Continuing)—“Whatever the possibilities may be of there being a reduction of hours under the law for

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*Defendants' Witness, Leon R. Spear, Cross*

service employees in the building industry during the term of the contract, the right to such reduction should be preserved for the members of these unions." Do you remember such a statement being made? A. Yes, I think he did say, but it was referring to that State Law, not the Federal.

Q. I see. When he made that statement did he continue—did Mr. Maguire, on behalf of the union, continue by saying this:

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"That which would be intended by such a law or the application of existing laws would be of such importance to the public generally as would require that the contract relations between these parties be not a bar to the attainment of the object of such legislation."

Did he say that? A. I don't remember.

Q. That would be entirely inconsistent with what you have just previously said, is that right?

Mr. Bruce: Your Honor, I object to that characterization. If it is inconsistent, it is inconsistent.

Mr. Herwitz: If your Honor please, this is a very crucial point and I would like to argue it.

756

The Court: I think the way to do it is to ask the witness if it is inconsistent rather than state it is inconsistent, because that is something for the Court to determine.

Mr. Herwitz: Well, the only point is this: He said, in substance, that Mr. Maguire and the other union officials took the position that the Wage and Hour Law did not apply. Now maybe his idea of the words they used is different than your idea or my idea on that subject. I am trying to find out whether these used these words so that you and I may judge—

The Court: You may ask him that. You may ask him whether it is consistent or inconsistent.

*Defendants' Witness, Leon R. Spear, Cross*

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but I do not think you should say to the witness "It is inconsistent."

Mr. Bruce: May I also ask for the permission of the witness, in view of the complicated nature of that language, that he be permitted to examine that statement instead of depending upon Mr. Herwitz's reading of it before he answers the question.

The Court: The witness has not asked for that.

Mr. Herwitz: They want to see what is next.

Mr. Bruce: He has a right to ask for it, hasn't he?

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The Court: Well, I don't think so as yet.

Mr. Bruce: Did you understand the statement, Mr. Spear?

The Witness: No, I do not understand it. I do not know when it was supposed to have been said or where or what or anything about it.

Q. All right. At any time during these negotiations did Mr. Maguire or did the union say "That which would be intended by such a law or the application of existing laws would be of such importance to the public generally as would require that the contract relations between the parties be not a bar to the attainment of the object of such legislation"? A. I don't remember that statement at all.

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Q. You do agree, do you not, that such a statement is entirely inconsistent with the position that you say the union took? A. The statement that you have in that book might be, but I told you in connection with what Mr. Maguire and Mr. Bambrick and Mr. Sullivan said about the Wage and Hour is what they said. "Let us not waste any time."

Q. Yes. A. (Continuing) "We don't apply."

Q. There is no question in your mind— A. And the answer to it is when the McGrady Agreement was signed

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*Defendants' Witness, Leon R. Spear, Cross*

and started, the Federal Wage and Hour Act was already in effect. Why didn't they make a specific agreement to that?

Q. Would you say that this language that I have read, "That which would be intended by such a law or the application of existing laws," referred to the Federal Fair Labor Standards Act which was then in existence? A. Yes, it would, but I don't remember him saying it, and I don't know where you are reading from, and I don't know what it is all about.

761

Q. Do you remember that the union submitted a memorandum to Mr. McGrady? A. Yes, I knew there was one—I did not see it, but I knew there was a memorandum submitted by both attorneys. I did not see either one of them.

Q. Mr. Spear, isn't it a fact that the words I have just read to you, which you say refer to the Federal Fair Labor Standards Act, were submitted in a memorandum to Mr. McGrady by the union?

Mr. Bruce: Now just a minute. This witness did not say those words applied to any Federal Wage and Hour Law. Please be fair. It is difficult for you but try!

762

Q. Didn't you say that? A. No, I did not.

Q. Well, what did you say? A. I said I don't know what it refers to. I did not see the memorandum submitted by the union, I did not see the memorandum submitted by Mr. Merritt. When it came to legal memorandums and so forth we were completely satisfied that Mr. Merritt would handle it. I did not see any of it.

Q. I did not ask you whether you saw this memorandum—or I do ask you, and you say you did not, is that right? A. Yes.

Q. But you said before that the words I have read to you were words which applied to the Federal Fair Labor Standards Act? A. Well, it might apply to anything.

*Defendants' Witness, Leon R. Spear, Cross*

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Q. It might? A. Yes. It might apply to the State thing which was not yet an act.

Q. I see. Now, Mr. Spear, you testified this morning about what Mr. Maguire said and what Mr. Sullivan said and what Mr. Bambrick said, is that right? A. Yes.

Q. I am curious to find out whether or not they said the opposite of what you said they said and you did not understand them; is that possible? A. I don't understand your question.

Q. I am asking you whether they did not say that they thought that the employees involved in this dispute might be under the Federal Fair Labor Standards Act. A. No, they never took that position at all because we never discussed the Federal Law.

764

Q. I hate to ask this question, but you understand this English, don't you? A. Yes, sir.

Q. Just to test that I want to read this statement and ask you—I am going to read the whole statement—

Mr. Bruce: Your Honor, if we are going to have so much lengthy reading, let us have this offered in evidence.

Mr. Herwitz: We will have it in evidence.

Mr. Bruce: Or let us put it in evidence.

Mr. Herwitz: All right. I offer it.

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Mr. Bruce: What part do you want in evidence?

Mr. Herwitz: I offer the entire memorandum of the union.

Mr. Bruce: Let us identify it.

Mr. Herwitz: It is the memorandum in support of points urged by Local 32-B, in the matter of the arbitration of points of difference between Midtown Owners Association, Inc., Penn Zone, Inc., and Locals 32-B, 164 and 32-J of the Building Service Employees International Union.

The Court: What date was it submitted by the union?



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*Defendants' Witness, Leon R. Spear, Cross*

Mr. Herwitz: It was submitted by the union in February, 1939. The exact date I don't know.

The Court: February, 1939?

Mr. Herwitz: That is right, submitted to Mr. McGrady.

(Mr. Bruce examines book.)

Mr. Herwitz: Do you want it in?

Mr. Bruce: Ordinarily the defendant is entitled to see it before it goes in. I asked you to offer it and I am looking at it.

Mr. Herwitz: I assume you want it in.

Mr. Bruce: I am not objecting to it. I wanted to read it before you committed yourself. You offered it.

Mr. Herwitz: I have offered it.

(Marked Plaintiff's Exhibit 13.)

Mr. Bruce: Now I am going to read it.

Mr. Herwitz: All right. Shall we take a recess?

Mr. Bruce: I just want to look at it, that is all.

Mr. Herwitz: May I take my notes?

Mr. Bruce: Surely.

(Mr. Herwitz removes notes from the exhibit.)

Mr. Herwitz: I am also offering as Plaintiff's Exhibit 13-A memorandum of points of difference between the parties, and I will read that part—

Mr. Bruce: Why don't you read this into the record?

Mr. Herwitz: I will read this into the record.

The Court: Then there will be no Exhibit 13-A.

Mr. Herwitz: Yes. So that we may make this clear; before the matter was submitted to Mr. McGrady, the arbitrator, under the McGrady Agreement, the attorneys jointly submitted to him a memorandum, a joint memorandum of the points of difference, and one of the points of difference submitted reads as follows—

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*Defendants' Witness, Leon R. Spear, Cross*

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Mr. Bruce: This is point of difference A.

Mr. Herwitz: Yes.

"If during the period hereof, by any law, the hours of employment are reduced below the hours provided for herein, then this agreement shall be deemed to be and be amended to provide that hours of employment hereof, including relief periods, shall be as prescribed by such law or laws without any diminution of wage rates."

And then under that:

"The union maintains it is entitled to such a provision. The employer groups deny this."

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The Court: That is a stipulation, is it?

Mr. Herwitz: Yes.

Mr. Bruce: Let us have it clear on the record that that is point of difference A as agreed upon by the attorneys for the union and the employers' association, which is referred to in the first paragraph of Plaintiff's Exhibit 13 under the heading "Point of Difference 'A'."

Mr. Herwitz: Yes, and I will now read—

The Court: Is this a stipulation? Because otherwise we have nothing but the statement of counsel.

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Mr. Herwitz: That is a stipulation—is it not, Mr. Bruce?

Mr. Bruce: Yes.

Mr. Herwitz: I will read now from Plaintiff's Exhibit 13 the relevant portion as to Point of Difference A, your Honor. This is a memorandum submitted by Local 32-B to Mr. McGrady in February, 1939:

"Whatever the possibilities may be of there being a reduction of hours under the law for service employees in the building industry, during the term

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*Defendants' Witness, Leon R. Spear, Cross*

of the contract the right to such reduction should be preserved for the members of these unions. That which would be intended by such a law or the application of existing laws would be of such importance to the public generally as would require that the contract relations between these parties be not a bar to the attainment of the object of such legislation. Clearly the same would have as a primary purpose limitation of hours so as to create work for unemployed. Business would thereupon be absorbing from the relief rolls at least some of those who are willing to work. To freeze the hours provided for in this contract, in the building service industry for three years would be contrary to the best interests of the general public."

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Q. Now, Mr. Spear, I ask you whether it is your testimony that Local 32-B and its representatives took the position that the Wage and Hour Law, the Federal Fair Labor Standards Act then existing, could not possibly have any application to the employees involved in that dispute? A. I say that—I think you are confusing two different times.

774

Q. Can you answer my question? A. I say that they have had nothing in mind in connection with the Wage and Hour Law until they came to submit that memorandum; that the conversations that I was referring to specifically was sometime in December when these men made these statements, and you are referring to a document that was submitted to the arbitrator practically at the end of all the negotiations, at the end of the contract.

Q. In other words— A. And that they had no idea that the Federal Act would apply to them during the beginning of the negotiations when the arguments and the discussion was had.

Q. It is your testimony, then, that what you said this

*Defendants' Witness, Leon R. Spear, Cross*

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morning related to the first part of the negotiations? A. I said it was disposed of from the point of view of discussion and argument.

Q. Yes. A. And that they said, "It doesn't apply and don't waste any time."

Q. Your testimony is that later on in the discussions— A. No, it isn't my testimony. Your saying and reading me that document is a statement by the attorneys in the middle of February sometime.

Q. Well, that was before the contract was entered into?

A. Was actually signed, yes.

Q. Before it was entered into, wasn't it? A. I am quite convinced myself that it related to the argument in connection with the State Law that might come in spite of the fact that the language says "any law that may become involved." Now as it happens practically, if you follow the language there, the thing became a law after the McGrady—almost after the McGrady thing expired.

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Q. Mr. Spear, you volunteer these statements. I think I will have to go into them— A. Well, if I understand it, you wouldn't let me read this. You are picking out phrases—

Q. You read it. A. Let me read it.

Q. You read it and you tell me whether you still think it applies to state legislation (handing to witness). A. No, I didn't say that it applies—I said it is my conviction, it is my feeling that—

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Q. I am not asking you about your feeling. Do you say that that applies to state legislation? A. (Witness examines exhibit.)

Mr. Bruce: Your Honor, I am going to object to the question. Mr. Spear did not draft this document and he does not know what it is intended to mean. Your Honor is perfectly competent to say what it is intended to mean.

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*Defendants' Witness, Leon R. Spear, Cross*

Mr. Herwitz: Your Honor—

The Court: I think you are right. This is cross examination.

Mr. Herwitz: That is right.

A. Well, read this particular thing, now that I have had a chance of reading it rather than catching pieces of it as you read it—

Q. Yes. A. —it would apply to any kind of a law.

Q. And not limited to state law? A. No, not the language as it is written there.

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Q. Wouldn't your interpretation be that it was referring to any Wage and Hour Law then existing and to be enacted? A. The way it is written, yes.

Q. And that would include the Federal Fair Labor Standards Act? A. Yes, according to the language of that memorandum.

Q. No question about that, is there? A. (No response.)

Q. Mr. Spear, when was the first time that you learned that the union was taking the position that the employees of a building, such as the Arsenal Building, might be covered by the Fair Labor Standards Act? A. The union itself.

Q. Yes. A. 32-B?

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Q. Yes. A. When the Wage and Hour Division—I think it was just before or just after we were served with the papers on the—

Q. On the injunction proceeding? A. On the injunction, yes. We got to know that the union was helping in some of the data because we were the ones served.

Q. Yes. A. Well, that was in March, 1940, wasn't it? A. Whatever that date is, yes.

Q. Didn't you know at that time that the union was pressing and hoped that the Government would win that suit? A. Well, I knew that they were helping the Wage and Hour Division to get the data. Naturally if they were helping the Wage and Hour Division they were



*Defendants' Witness, Leon R. Spear, Cross*

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anxious for the case to go along and that they should win it.

Q. What paper do you read? A. I read the Times in the morning, the Telegram and Journal in the evening.

Q. Did you read the publicity about the case? A. Yes, sir.

Q. You think you did? A. I am pretty sure.

Q. When you learned that the union was co-operating with the Government in this injunction proceeding, Mr. Spear, you were put on notice, were you not? A. Oh, we knew—

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(Mr. Bruce stands up.)

Mr. Herwitz: I withdraw it.

Q. In March, 1940, when you knew that the union was co-operating with the Federal Government in seeking to have it established that your employees were covered by the Fair Labor Standards Act, were you concerned about it? A. Yes.

Q. And did you go to the union and seek to reform the contract you had entered into with the union? A. No.

Q. Do you know whether the association did? A. I don't know whether they did. I don't think so.

Q. Did you go to Mr. McGrady to have him arbitrate the situation? A. No.

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Q. Did you go to anybody at that time to have him arbitrate the situation? A. No.

Q. Did you make any claim at that time that the contract you had entered into did not express what you intended to— A. No.

Q. —have it convey? A. No.

Q. Did you call up anybody in the union and call them double-crossers for doing that? A. No.

Q. Did you continue your friendly relations with them thereafter? A. Yes, sir.

Q. And did you from time to time see them in the course of your business, or hear from them? A. Yes.

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Did you ever accuse them of violating their word in trying to bring about a result that none of the parties intended? A. No, sir.

Q. And did you know that the union intended to try to get the money back for the men, the back wages, in the event that the suit was won? A. Well, I did not know the union was doing it. I knew that the Federal Wage and Hour were doing it.

Q. Didn't you read in the newspapers that the union had such an intention? A. Yes, sir, I think I did.

785

Q. And didn't you read in the newspapers that Mr. Bambrick felt and the union felt that the members were entitled to these back wages even though the contract provided for different maximum hours than those provided in the Wage and Hour Law? A. I might have read it.

Q. I show you the New York Times for Friday, March 22, 1940, entitled, "Loft Owners Sued Under Wage Law," and ask you whether or not you read that article at that time (handing to witness)? A. Yes, I think I did. I am pretty sure I did.

Mr. Herwitz: I would like to offer this newspaper in evidence.

786

Mr. Bruce: May I see it?

(Mr. Herwitz hands paper to Mr. Bruce.)

The Court: What is the date of that?

Mr. Herwitz: March 22, 1940.

Mr. Bruce: For what purpose is that being offered, Mr. Herwitz?

The Court: I will have a look at it.

(Paper handed to the Court.)

The Court: You can go ahead with your questions. I think I can follow it.

Mr. Herwitz: Yes. Just in answer to Mr. Bruce's question there are several points upon which the article I have just shown and which I have offered in evidence is relevant. I think the total answer

*Defendants' Witness, Leon R. Spear, Cross*

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or the easiest answer for me to make is that it is relevant on our counterclaim in which we allege that the defendants failed to take timely action to reform this contract, on the laches point. I think that the article indicates that the defendant had full and adequate notice in March, 1940, of the union's position.

The Court: This is offered for the purpose of showing notice, is that it?

Mr. Herwitz: At least for that purpose.

Mr. Bruce: Notice of what, Mr. Herwitz?

Mr. Herwitz: Of the union's position in regard to the application of the Federal Fair Labor Standards Act.

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Mr. Bruce: Well, I object to anything that appears in the New York Times as being notice to these owners of what the union's position was.

The Court: I think I will receive it. I haven't read it yet.

Mr. Bruce: After all, it is merely a report that a case has been started by the Wage and Hour Administrator, and purports to quote a number of people as to what they think of the case. It isn't in any way notice to these owners that the Federal Wage and Hour Law does apply to them; merely that the Federal Administrator has started a suit.

789

The Court: I think I shall receive it. I haven't read it.

The Clerk: That is page 14.

The Court: If you press the objection I shall read it carefully.

Mr. Bruce: I think I do press the objection for that broad purpose.

The Court: Well, mark it for identification.

(Marked Plaintiff's Exhibit 14 for identification.)

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*Defendants' Witness, Leon R. Spear, Cross*

Mr. Bruce: I am perfectly willing if Mr. Herwitz offers it to show when the suit was started, to concede when it started, but I am not willing to let it go into evidence except over objection as notice to this defendant or to any of these employers that this act was applicable to them and that the union was taking that position formally.

The Court: Did you hear what Mr. Bruce said?

Mr. Herwitz: I am sorry, your Honor. What did you say?

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Mr. Bruce: I said that I am perfectly willing to stipulate that this action started, but I am not willing to let it go in for the purpose that this is notice to us that the Act is applicable to us or that the union intends to hold this owner or these associations.

Mr. Herwitz: If your Honor please—

The Court: I do not think I want to discuss it now. I thought before I ruled on it I had better read it. So it is marked for identification.

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Mr. Herwitz: May I just point this out, your Honor. I asked this witness whether or not, after he read the article, he got in touch with the union. That is, if he got in touch with Mr. Bambrick to speak to him.

The Court: I know you did, and I thought it was admissible on the ground of the notice that you referred to. I am still inclined to think so, but I think I had better read it.

Mr. Herwitz: All right.

*Defendants' Witness, Leon R. Spear, Cross*

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New York, February 11, 1943, 10:30 A. M.

Trial resumed.

LEON R. SPEAR, resumed the stand.

*Cross Examination continued by Mr. Herwitz:*

Mr. Herwitz: Before proceeding, I reoffer the newspaper, your Honor.

The Court: I will look over it. It is a rather long article, so I will read it when I have the first opportunity, perhaps during the forenoon sometime.

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Mr. Herwitz: I would like to cross examine him in regard to it, so may I—

The Court: Then I think the only thing for me to do is to read it.

Mr. Herwitz: I am afraid so, your Honor.

The Court: All right. You are offering it for what purpose?

Mr. Herwitz: May I call your Honor's attention to the fact that I asked the witness yesterday whether or not, after reading this newspaper article, and whether or not, after being informed from that article that the union was co-operating with the Government in this Wage and Hour suit, he had communicated with the union, whether or not he had taken any steps in connection with the fact that the union was apparently co-operating with the Government, whether or not he considered—I don't remember the exact words, but whether or not his relationship with the officials of the union was in any way impaired or destroyed, whether or not he took any action to claim that the contract, the McGrady Agreement, was, as he now says it is. I do not think these exact questions were put, but that is the general line. I feel

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*Defendants' Witness, Leon R. Spear, Cross*

that having thus been put on notice by that newspaper article of the state of mind of the union, and what the union was doing, it was incumbent upon him, if he claimed that the contract did not state what the parties intended it to state, to then and there, or soon thereafter, take action that he now has taken. But he did not do that; he made no attempt to do it. I also believe that his failure to inquire from the union as to their position after reading this article in the newspaper, goes to the accuracy or the veracity of his statements that the intention of the parties was as it is claimed by the defendants.

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I further believe that the newspaper article, or the knowledge contained therein, was sufficient to cause him to act in such a way, to act with reasonable promptness so that Meyer Greenberg, the plaintiff in this action, might not, under the assumption that the McGrady Agreement was as stated, I mean I am assuming their arguments have any validity—that Meyer Greenberg had reason to believe that he was working under the conditions as set forth in his contract, implied or direct contract with the employer. Meyer Greenberg for three years after this article appeared, or for two and a half years, let us say, continued to work in the building under the terms and conditions that he was working. In other words, this being an equitable action, I think your Honor has to measure the equities of the plaintiff and of the defendants and the laches, and for other reasons, and in addition to that, your Honor, I think the door has been widely opened by the action of the defendant in urging upon your Honor and succeeding in putting into the record the statements of James J. Bambrick without his being on the stand, which, as contained in the union article, purported to show

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*Defendants' Witness, Leon R. Spear, Cross*

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the state of mind of Bambrick. Now I have no opportunity to cross examine that man and I think the defendant, by putting in that hearsay, incompetent document, has completely opened the door for me to put in what otherwise might be considered incompetently proved.

Mr. Bruce: May I say just this, very briefly. I think the vice of the whole thing is demonstrated by Mr. Herwitz's statement that Mr. Spear, having been put on notice as to the union's attitude by an article in the New York Times—and the New York Times, as I understand it, always prides itself on being an independent newspaper; this is not the official paper of Local 32-B nor of the Realty Owners, nor has it ever been.

800

As to the statements of Mr. Bambrick, those are statements that Mr. Bambrick made both orally and in the official publication of the union. He was the president of this union, and Mr. Herwitz can subpoena him just as well as I can. I haven't been successful but there is a real distinction between the two journals. This does not put us on notice of anything except that the Federal Wage and Hour Administrator has started an action against Mr. Spear, and Mr. Spear has admitted that the action was started, two days before that story was written.

801

Mr. Herwitz: If your Honor please, as far as that claim being made that the statements of Bambrick are admissible because they appeared in the union magazine is concerned, the fact that it is a union magazine of which the plaintiff Greenberg is a member, does not add any great dignity to that publication. We saw from the testimony of the witness Young that what appeared in the union magazine was false, that he did not write that article to which his name was subscribed.

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*Defendants' Witness, Leon R. Spear, Cross*

• 'Now, how am I to test the veracity of what appears in that magazine if I do not have the witness here?

Mr. Bruce: Are you seeking to repudiate Mr. Bambrick?

Mr. Herwitz: What do you mean, am I seeking to repudiate him?

• Mr. Bruce: Well, you referred to one of the articles of that newspaper statement as containing statements—

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Mr. Herwitz: I was never married to him, and you have to be married to him before you repudiate him.

Mr. Bruce: All right.

The Court: I will read the article. This article says that Mr. Fleming, Colonel Fleming, has filed a suit asking for an injunction restraining the owners and the managers of a Garment Center building from "future violation" of the law. (Reading.)

Well, I think I will receive it in evidence, not as proof of the facts but on the theory suggested, of notice. Possibly it relates to the credibility of the witness.

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Mr. Herwitz: I want to state that I do not offer it as proof of the contents contained therein.

(Plaintiff's Exhibit 14 for identification received in evidence.)

Q. Mr. Spear, did you, on the date that this article appeared in the New York Times, read the other newspaper comments about the institution of the suit appearing in the local press? A. Well, I remember reading some papers announcing that a suit had been started.

Q. Do you remember reading the New York Herald Tribune which had an article on its first page that day concerning this? A. No.

*Defendants' Witness, Leon R. Spear, Cross*

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Q. Did you— A. I don't read the Herald Tribune.

Q. Yes. You told me you read the New York Times ordinarily. A. Yes.

Q. Did you read the Herald Tribune that day? A. No.

Q. Well, let me show you a typewritten report and ask you whether it refreshes your recollection as to whether or not you read the Herald Tribune on that day (handing)?

Mr. Bruce: He just said that he never reads the Tribune.

A. I never read the Tribune.

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Mr. Bruce: Your Honor, I object to that. I mean, the witness stated categorically that he never reads the Tribune. Now he is being asked whether this refreshes his recollection as to whether he read it.

The Court: I should think it is a useless question if he says he never read it.

Mr. Bruce: I should think so.

Mr. Herwitz: If your Honor please, I think he said he customarily read the New York Times—

The Court: I think, gentlemen, we can avoid discussion. Let him answer the question. Of course he said he never read it, but if he can look at it— 807

The Witness: I never read the New York Herald Tribune, never.

The Court: The question is, do you recall whether you did.

The Witness: I never read the Tribune.

The Court: You did not read that?

The Witness: No, sir.

Q. Is it your testimony that you never in your whole life have read the Herald Tribune? A. Well, no, I would not say that. I have every once in a while—I will see a

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*Defendants' Witness, Leon R. Spear, Cross*

Tribune lying around, will pick it up and glance through it, but as a regular practice I come in from the country every morning, I buy the New York Times, and I have all I can do to read the New York Times.

Q. Well, at some time in your life you have read the Herald Tribune? A. Oh, yes, I think so.

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Q. And are you unequivocally stating to this Court, without reading the document I have shown you, without reading it, that you are sure that on the day that this action was commenced against your building that you only read the Times report on it, but did not read the report appearing on the first page of the Herald-Tribune? A. No, I would not say that I was sure I did not read it, that day, or that article. I am not sure.

Q. I see. Have you read this article I have shown you? A. Not yet, no.

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Q. Will you read it and see if it refreshes your recollection, please (handing)? A. (After examining) Well, it does not refresh my recollection as to whether I read the Tribune that morning, or read this article in the Tribune. I read a number of articles in connection with this whole case with the announcement—I can't tell you now definitely whether I read that article in the New York Tribune that morning.

Q. What is your best guess about it, Mr. Spear? A. My best guess is that I did not read the Tribune.

Q. That you did not read that article? A. No, that I did not read article in the Tribune, my best guess.

Q. That is your best guess? A. And of course it appeared in the Times.

Q. Yes. A. And that was as good enough for me as anything. Of course I did not have to be put on notice by all papers that were being served in a suit.

Mr. Herwitz: I would like to have this marked for identification. I am not offering it in evidence at this time.

(Marked Plaintiff's Exhibit 15 for identification.)



*Defendants' Witness, Leon R. Spear, Cross*

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The Court: And the date of it?

Mr. Herwitz: March 22, 1940. It is not the newspaper itself. I could not obtain it. It is a reprint of an article.

Q. Now, Mr. Spear, how long do you know Meyer Greenberg? A. Well, I guess ever since he has been in the building.

Q. Do you frequently see him in the building? A. Yes, I ride up in his car quite frequently.

Q. During the times covered by the complaint did you frequently see him in the building? A. Yes.

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Q. What are his duties? A. He switches from one passenger car to the other, running the car up and down, taking the passengers to their floors, discharging them, bringing the car down and taking them up again.

Q. What business is Max Schneck in? A. He is a manufacturer of ladies' dresses.

Q. Have you been engaged for a long time as a real estate agent and managing agent in the Garment Center? A. Yes.

Q. Are you generally familiar with the businesses carried on by the tenants to whom you rent space? A. Yes, generally.

Q. And do you know that a manufacturer of dresses in the Garment Center manufactures them at his premises or sends them out to a contractor? A. Yes.

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Q. Do you know which is the case as far as Max Schneck is concerned? A. He manufactures right on the premises.

Q. Do you know whether he has any contractors? A. I don't know.

Q. Do you know whether or not after he manufactures on the premises these dresses are shipped all over the country?

Mr. Bruce: Your Honor, I object to this unless Mr. Herwitz discloses the purpose. I take it that his purpose is to show that Mr. Spear—

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*Defendants' Witness, Leon R. Spear, Cross*

Mr. Herwitz: Wait a second. Now wait.

Mr. Bruce: Just a minute.

Mr. Herwitz: May I just interrupt—

Mr. Bruce: You state your purpose—

The Court: I think Mr. Bruce has a right to state his objection.

815

Mr. Bruce: Apparently not without physical combat. The coverage of the Wage and Hour Law in this case is admitted, so I suppose the attempt here is that Mr. Spear knew the facts, knew that dresses were manufactured here and they might be shipped to retailers in New York or wholesalers someplace else. But it is immaterial the issues in this case because we have admitted—

The Court: Have you admitted coverage both as to the Arsenal Building Corporation, the owners, and as to Mr. Spear, or the Spear Corporation?

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Mr. Bruce: Oh, no, not as to Mr. Spear. We have denied that Mr. Spear is an employer in any event. We have admitted that as a result of the Supreme Court decision on June 1, 1942, that the plaintiff Meyer Greenberg, under that decision, is to be deemed an employee engaged within the production of goods for interstate commerce, within the meaning of the Act which entitled him, therefore, in the absence of defenses, to the coverage of the Act, but that is not an issue in this case.

Mr. Herwitz: If your Honor please, if you will allow me to speak on this point, I would like first to comment on the fact that this is cross examination, that I have always understood the reason for cross examination is to test the truth and accuracy of the witness's testimony on direct. It is not helpful to putting that test and determining his truth and accuracy if counsel at the beginning

*Defendants' Witness, Leon R. Spear, Cross*

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of a new line of questioning is able to jump up and not too subtly indicate to the witness the dangers and pitfalls of the answers that he is likely to give, and what is coming. I do not think that gives me an adequate opportunity of testing the veracity and the accuracy and the truth of this witness, that is, so far as interruption and objection of Mr. Bruce.

The Court: Now I will answer that. I do not think there was anything in Mr. Bruce's statement that would affect the testimony of this witness.

Mr. Herwitz: If your Honor please, I except to that.

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The Court: So go on to your next point.

Mr. Herwitz: My next point is this, that the allegation in this answer is that there was a mistake of fact and law. I am trying to ascertain what knowledge this man had and what knowledge he did not have, and what mistakes of fact are involved. Now if they will concede that he knew the duties of Meyer Greenberg and of the tenant Max Schneck, and others, then there is no point in my further asking him. I predict that after the objection has been interposed Mr. Spear will now answer that he does not know the business of Schneck and the others.

819

The Court: I would not be surprised if he answers he did not know because I inferred from his previous testimony that he probably did not know the intimate business arrangements of the various tenants in that large building.

Mr. Herwitz: I have not asked him about all. I asked him about Mr. Schneck.

The Court: Or even one of them. Now as to the general proposition, I should think you are entitled to ask these questions. You have some rather difficult questions in this case. As I said

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*Defendants' Witness, Leon R. Spear, Cross*

several times, I would rather be liberal in receiving the testimony because there is no jury here, so I think you may go ahead.

Mr. Bruce: On Mr. Herwitz's statement that this is designed to test whether or not there was any statute affected, I withdraw my objection to that, because that is an issue in this case.

The Court: Well, anyhow, it seems to me you can go ahead, Mr. Herwitz, with your question.

Mr. Herwitz: What was the question?  
(Question read as follows):

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"Q. Do you know whether or not after he manufactures on the premises these dresses are shipped all over the country?" A. I do not.

Q. How many times a day did you go in and out of that building? A. It varies. Sometimes twice, sometimes ten, sometimes not at all. When I spend the day at the main office I do not get there at all.

Q. Didn't you say in the course of your testimony here that you go in and out of the building ten or twelve times a day? A. I said it varies.

Q. Didn't you say that? A. Yes.

Q. You say something different now? A. Not as an  
822 everyday proposition. I couldn't do it.

Q. But I just asked you, Mr. Spear, what is it? Didn't you say that you go in and out of the building ten or twelve times a day? A. Yes, I go in and out ten or twelve times a day.

Q. Do you want to change that or qualify that—is that right? A. Well, it wasn't a literal answer that every day of every week that I go into that building ten or twelve times a day. Sometimes I might go more; it all depends on what I have to do on the outside, and whether I have to come back. Now in the last four days I have been there only twice, once in the morning—no, only once. In the last four days I have been there only once a day, just in the morning before coming to court.

Q. When you entered into the McGrady Agreement, did you believe that Max Schneck did not ship any dresses from his premises at 463 Seventh Avenue, to a point out of New York State?

Mr. Bruce: Your Honor, I object to what he believed about Max Schneck's business.

The Court: I will overrule that objection.

A. I never had any thought about it at all.

Q. You had no belief? A. I had no thought. I never even gave it a thought. It isn't the kind of—anything that would interest me, whether he does or does not. 824

Q. You did not believe that he did not send merchandise out of New York State, did you? A. I just did not think of how he carried on his business. I am not interested in it.

Q. And if you did not think about it, what inference am I to draw from it? A. It is the kind of a thought that would not even enter my mind because it isn't necessary in the carrying on of my business as to whether he does or doesn't; so I wouldn't think about it.

Q. When you entered into the McGrady Agreement, you were not laboring under any misapprehensions because you gave them no thought, is that correct? A. I don't quite understand the question. 825

Q. I will reframe it. When you signed the McGrady Agreement, you did not think or give any thought to the nature of the business of the tenants of 463 Seventh Avenue? A. No.

Q. And giving no thought to that, would it be fair to say that you did not believe that the tenants of 463 Seventh Avenue did not ship merchandise from their premises to a point outside of New York State? A. Well, I don't think it is a question of belief or otherwise. It is a question of a thing that I wouldn't know or give any thought to. It wouldn't occur to me when we signed the McGrady Agreement, to think: Is Mr. Schneck or



anybody sending merchandise all over the country. I don't know why I should have to think about those things. We were negotiating a contract for wages and salaries and so forth, with 21 pages of demands. Why would I of necessity think about Mr. Schneck or any tenant, as to whether he does or does not send merchandise all over the country?

Q. And you did not think about it; did you? A. No.

Q. And therefore you had no such belief one way or the other, is that it? A. That is right.

Q. When you rent space in 467 Seventh Avenue and other buildings, do you ascertain the business of the tenants? A. Yes, it is right in the lease.

Q. Well, did you discuss with the tenants what business they are going to carry on there? A. No. In the first place, in nine out of every ten cases where we are making a lease, we know a man is either in the dress business or is in the coat business, or he is in some novelty business or any accessory to the garment industry. Secondly, the only question we have with regard to his business that is put in the lease, is whether he is a manufacturer, whether he is going to use it for showroom purposes or stock or cutting, or something like that, and that is right in the lease, in the lease specifically. That says what the business is.

Q. How long have you known Max Schneck? A. Well, I have known him in business—not at all socially. Socially I know him not at all in all the years that he has been a tenant of ours. But I would say that I have done business with him, rented him lofts—well, I rented him his loft originally in the Arsenal Building, which was in 1926. He came from 14th Street at that time. I dug him up then and that was the first time I had met him, and that is the only business deal I had with him in connection with making a lease.

Q. Well, do you have a more intimate connection with the Arsenal Building than most of your other clients?

*Defendants' Witness, Leon R. Spear, Cross*

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A. No, excepting that I would meet—I would be in a position to meet tenants in the Arsenal Building more frequently than I would tenants of the other buildings because of the fact that we have this office upstairs and I am going in and out of the building all the time.

Q. Are you an officer of all the buildings or corporations owning buildings that you manage? A. No. This is the only building that I act as—or any of my associates act as secretary of this corporation. This is the only building in which we hold an office.

Q. Then there is that difference between the other buildings whose property you manage, is there not? 830.

A. Yes—no, I think there are one or two others; I think so.

Q. You are not sure? A. No, I am not.

Q. Now in addition to your being an officer of the Arsenal Building, your brother, Aaron Rabinowitz, is an officer, is he not?

The Court: I could not hear that.

Q. (Question read.) A. Yes.

Q. Aaron Rabinowitz, your brother, is the treasurer? A. Yes.

Q. Of the Arsenal Building Corporation? A. Yes.

Q. Is that correct? A. That is right. 831

Q. Do you know whether he owns any stock in that corporation? A. He is a trustee for second mortgage bondholders who had the second mortgage originally on this property before it was taken over from the Seventh Avenue and 35th Street Corporation.

Q. Is he active in the corporation's affairs, in the management of the corporation's affairs? A. Yes, I think he is.

Q. Is he more active than Mr. Schneck, let us say? A. Well, it is a toss-up, I guess. That is, nothing is done without the two of them agreeing.

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*Defendants' Witness, Leon R. Spear, Cross*

Q. Without the two of them agreeing? A. Yes, sir.

Q. And when you say that you had to check up on whether you could pay certain salaries to the employees over and beyond those contained in the union agreement, did you include your brother as one of those? A. Oh, yes.

Q. Mr. Spear, in these associations, the Midtown and Penn Zone Associations which deal with the unions, are you a member or is Spear & Company or is the Arsenal Building Corporation a member? A. Arsenal Building Corporation is a member.

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Q. And do you represent the Arsenal Building Corporation? A. No.

Q. In the meetings of the Association? A. No.

Q. Are you a member—is Spear & Company a member of the Midtown Realty Owners Association? A. No.

Q. Well, are you any officer in that association? A. I don't know whether I am an officer. I am a director of the Midtown Realty.

Q. I see. Has Mr. Schneck or any other officer of the Arsenal Building Corporation ever attended any meetings of the Midtown? A. Yes.

Q. In connection with labor policies? A. Yes.

834

Q. When? A. Well, they would be general meetings reporting during the negotiations with the union on any of the new contracts. The Midtown and Penn Zone will call a meeting of all the members.

Q. Yes. A. I think once or twice they were there just listening to the report and certain particulars.

Q. Well, when you attend these negotiating meetings with the union do you attend as an owner or as a managing agent? A. I attend as a director of the Midtown Association.

Q. And is your interest as an owner or as a managing agent? A. Well, my interest is in the association—is one that would be necessarily so because I am in the business, and anything that would affect the real estate

business, not only in the Midtown but in any part of the city where we operate, I would be interested in and pay some attention to.

Q. Yes. Now, don't you handle or don't you represent your principals in these negotiations? A. No, I did not represent them in the negotiations at all. I represent the association. The principals approve or disapprove as to whether they want to be committed, to become a signatory or otherwise, and when they had there the members, they are the ones that the bills are made out to and they are the ones who pay them.

Q. You do not own any real estate in New York City? A. Not only in New York City, but outside of my own home I own no real estate.

Q. Mr. Spear, will you look at the records there and tell me whether they are the records of Spear & Company (handing)? A. This is the pay roll record of 463 Seventh Avenue.

Q. Does that contain the pay roll record for Meyer Greenberg? A. Yes, his name is on that pay roll sheet.

Q. Is this sheet which is dated May 4, 1939, similar to your pay roll records throughout the period? A. Yes,

Mr. Herwitz: I offer this sheet as Plaintiff's Exhibit 16.

The Court: What is that?

Mr. Herwitz: Well, Mr. Spear described it.

The Witness: It is a weekly pay roll sheet covering the building at 463 Seventh Avenue.

Mr. Bruce: What week does it cover?

Mr. Herwitz: April 27, 1939, to May 4, 1939. (Marked Plaintiff's Exhibit 16.)

Mr. Herwitz: Mr. Bruce, I intend to amend that offer to make it all the pay rolls for the month of May, 1939.

838

*Defendants' Witness, Leon R. Spear, Cross*

Mr. Bruce: Of course the pay rolls do not run by months. You mean all the weeks included in that month.

Mr. Herwitz: Yes.

Mr. Bruce: That is right. Just identify the weeks that you want, Mr. Herwitz, by the weekly periods.

839

Mr. Herwitz: Plaintiff's Exhibit 16 should include the pay roll sheet for the week ending May 4, 1939, May 11, 1939, May 18, 1939, and May 25, 1939, each weekly pay roll containing two sheets, eight sheets in all.

Mr. Bruce: May we substitute photostatic copies? These records have to be kept pursuant to Federal law.

The Court: I understood that each of you have substituted or are allowed to substitute photostatic copies in lieu of the originals in several instances.

Mr. Bruce: Yes.

840

Mr. Herwitz: And I also offer the pay roll sheets for the weeks of May 2, 1940, May 9, 1940, May 16, 1940, May 23, 1940, and May 30, 1940—ten sheets in all.

(Marked Plaintiff's Exhibit 17.)

Q. Mr. Spear, is there a freight elevator in 463 Seventh Avenue? A. Four freight elevators.

Q. Did Meyer Greenberg ever tell you that the tenants of the Arsenal Building were not engaged in interstate commerce? A. Did he ever tell me?

Q. Yes. A. No.

Q. You never discussed it with him? A. No.

Q. Did the union, Local 32-B, ever represent to you that the tenants of the Arsenal Building were not manufacturing merchandise on their premises and shipping it to points outside of New York? A. Never had any discussion about it.



*Defendants' Witness, Leon R. Spear, Cross*

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Q. Of any kind or character? A. Not in regard to tenants, no.

Mr. Herwitz: That is all.

Mr. Bruce: No questions.

The Witness: May I make this observation, your Honor?

The Court: Yes.

The Witness: In connection with my brother, Mr. Aaron Rabinowitz, he has not had, does not have any financial interest or any other interest in the company, Spear & Company, since May 1, 1928.

842

Mr. Herwitz: I move to strike out the testimony of the witness on the ground that it is irrelevant, incompetent and immaterial, and on all the grounds previously urged.

The Court: If this is to all of Mr. Spear's testimony, that motion is denied.

Mr. Herwitz: Yes. And I also move to strike out that part of his testimony relating to negotiations with the union.

The Court: That motion is denied.

Mr. Herwitz: And I also move to strike out the testimony of the witness Spear as to any conversations not had in the presence of the plaintiff Meyer Greenberg.

843

The Court: That motion is denied.

Mr. Herwitz: And I move to strike out all of the testimony on all the other grounds previously urged.

The Court: That motion is denied. I have made it clear, I think, Mr. Herwitz, it is much better to let the testimony remain for consideration as it is entitled to, when I have the case.

Mr. Herwitz: I understand that.

The Court: You run a risk if I strike it out and find that it is wrong.

844

*Defendants' Witness, David Sullivan, Direct*

Mr. Herwitz: Yes. Frankly, I am making a record.

The Court: Yes, I understood so, and so am I.

Mr. Bruce: Mr. Sullivan, please.

New York, February 11, 1943,  
10:30 A. M.

845

Trial resumed.

DAVID SULLIVAN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

*Direct Examination by Mr. Bruce:*

Q. Mr. Sullivan, you are present president of Local 32-B, are you not, today? A. Yes.

Q. And when did you become—

The Court: Excuse me; you call it Local 32-B?

Mr. Bruce: Yes—Building Service Employees' International Union, A. F. of L.

846

The Witness: That is correct.

Q. That is the correct title, isn't it? A. That is right.

The Court: Local 32-B, Building Service Employees' International Union, A. F. of L.—is that right, Mr. Sullivan?

The Witness: That is right, Judge.

Q. When were you elected president, Mr. Sullivan? A. June, 1941.

Q. And you were elected by the general membership of the union, were you not? A. That is correct.

Q. At a meeting duly called pursuant to your constitution and by-laws? A. Correct.

*Defendants' Witness, David Sullivan, Direct*

847

Q. Who was your predecessor in office as president of Local 32-B? A. James J. Bambrick.

Q. And how long had he been president of this union? A. Since 1934.

Q. Before you became president you were treasurer of the union, were you not? A. Correct.

Q. How long did you serve as treasurer? A. Since 1938 up to the time of my election as president in June, 1941.

Q. What month were you elected treasurer in 1938? A. Well, offhand, I think in September.

848

Q. September, 1938? A. That is right.

Q. And since September, 1938, you have been an editor of the magazine "Building Service," have you not? A. Not since 1938.

Q. Since when? A. Since June, 1941.

Q. I see; but since September, 1938, or at least during that part of the period when you were treasurer you had a column in Building Service over your own signature as treasurer, did you not? A. That is correct.

Q. In your present position as president of the union you are the head of the union negotiating committee, are you not? A. In these—

Q. In wage negotiations? A. Yes.

849

Q. And were you the head of the Wage Negotiation Committee that negotiated with the Penn Zone and Mid-Town associations in December, 1941, and January, 1942, looking toward the renewal of the McGrady Agreement?

Mr. Herwitz: If your Honor please, I wish to object to this entire line of questioning on the grounds previously urged: irrelevant, immaterial.

The Court: That objection is overruled.

The Witness: Will you repeat the question?

Q. (Read.) A. Yes.

850

*Defendants' Witness, David Sullivan, Direct*

Q. Did you assist in the preparation of the demands of Local 32-B at that time? A. Yes.

Q. Are you familiar with those demands today? A. I believe I am.

Q. I show you this document dated December 2, 1941, and ask you whether or not that is a copy, a true copy of the demands submitted by the union to the negotiating committee of the Penn Zone and Mid-Town associations (handing to witness)? A. Yes.

851

The Court: I think the record ought to show what you handed him.

Mr. Bruce: I am going to offer it in evidence, your Honor.

Defendants are offering in evidence a paper dated December 2, 1941, entitled "Demands Made by the Union (Local 32) through The Wage Scale Committee for Revision and Amendment of the McGrady Agreement to Become Effective February 4, 1942."

Mr. Herwitz: I of course object to it on all the grounds previously urged in regard to its relevancy and materiality.

(Marked Defendants' Exhibit J.)

852

Q. Mr. Sullivan, when these demands were presented, the Federal Wage and Hour Law had been in effect more than three years, had it not? A. I believe so.

Q. And your union, under the heading "Wages" as part of paragraph 3 made the following demand, did it not:

"In the event that during the period hereof, any law is established by legislation enacted requiring a reduction in hours below those provided for herein, no employee shall suffer any decrease in the weekly wage provided for herein.

*Defendants' Witness, David Sullivan, Cross*

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"In the event that the said hours are so increased, any employee so affected shall immediately receive a commensurate increase in his weekly wage."

Your union made that demand in December, 1941, did it not? A That is correct.

Mr. Bruce: That is all.

*Cross Examination by Mr. Herwitz:*

Q. Mr. Sullivan, did Local 32-B also demand a 40-hour week in these demands? A. Yes.

854

Q. Reading from the exhibit:

"Hours. Provision 4 shall be eliminated and the following provisions inserted in its place: Effective as of February 4th, 1942 the regular work week for all employees covered by this agreement shall not exceed five days per week nor more than 40 hours, which time shall include two thirty (30) minute relief periods each day for elevator operators and starters, but shall exclude a luncheon recess for all employees which shall not exceed one hour and which shall be given at the middle of each employee's working day."

855

Did you demand that? A. Yes.

Q. And was that in compliance with the Federal Fair Labor Standards Act?

Mr. Bruce: Your Honor, I object to that, as to whether it was in compliance. That calls for a conclusion. Obviously the demand was not any compliance. Merely ask him to give the fact.

Mr. Herwitz: The Court will take judicial notice that that demand was in compliance with the Federal Fair Labor Standards Act.

Mr. Bruce: Nothing in the Federal Wage and Hour Law requires your employees to abide by the



856

*Defendants' Witness, David Sullivan, Cross*

law, is there, or to enforce it against an employer?

Mr. Herwitz: I do not have to answer it, do I, your Honor?

Mr. Bruce: Well, the Court can take judicial notice of that, too.

The Court: If you have an answer, you may make it.

Mr. Herwitz: I just do not think I am on the stand, your Honor. I will answer him later, I assure you.

857 Q. Mr. Sullivan, did you hear Mr. Leon Spear testify?  
A. Some of his testimony I heard.

Mr. Bruce: Are you going to make Mr. Sullivan your own witness now? Because I did not ask anything about Mr. Spear's testimony. Do you want to call him in order or call him out of order?

Mr. Herwitz: Well, I assume—

Mr. Bruce: This is not proper cross examination, anything that I asked about Mr. Spear, because my questions to Mr. Sullivan were rather carefully confined, I thought.

858

Mr. Herwitz: If your Honor please, it seems to me—

The Court: I do not see why you discuss it before I hear the question, because there is nothing for me to rule on.

Mr. Bruce: I am sorry, your Honor. I am anticipating the question, I guess.

Mr. Herwitz: Is there a question unanswered? (Record read.)

The Court: Is there objection to that?

Mr. Bruce: I am objecting to it as cross examination, yes.

*Defendants' Witness, David Sullivan, Cross*

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The Court: I cannot see that there is anything wrong about that question and answer.

Mr. Bruce: Well, there isn't anything in itself except that it seems to indicate—

The Court: I cannot anticipate.

Mr. Bruce: Very well.

The Court: I should think that question may be quite in order. It may not.

Mr. Bruce: Well, standing alone, of course it is immaterial. I will let Mr. Herwitz proceed.

The Court: If it is followed by other questions, that may be a different situation.

860

Q. Mr. Sullivan, were you on the negotiating committee that negotiated the McGrady Agreement? A. Yes.

Q. Were you present at all of the meetings? A. Yes.

Q. Did you at any of those meetings say in words or substance that in your opinion the Wage and Hour Law did not apply to the employees involved in that dispute? A. No.

Mr. Bruce: Just a minute. Your Honor, I object to that as cross examination unless Mr. Herwitz wants to make this witness his own witness for the purposes of rebuttal. It is obviously rebuttal. I did not ask him anything about negotiations.

861

The Court: I do not think you did.

Mr. Bruce: I asked him no questions about negotiations of the McGrady Agreement; only about demands presented at the end of the McGrady Agreement looking toward its renewal, so it obviously is not cross examination.

The Court: I should think it was not cross examination.

Mr. Hewitz: Well, even if it weren't cross examination, is your Honor ruling that I should not ask him that at this time?

862

*Defendants' Witness, David Sullivan, Cross*

The Court: Well, I ordinarily would think so, but there is no point in bringing this witness back again—

Mr. Herwitz: He has been in court at Mr. Bruce's request for several days.

The Court: Why, certainly. Mr. Herwitz, I suppose that Mr. Sullivan has business to attend to, the same as anybody else, and as a matter of convenience, I think—

863

Mr. Bruce: That is perfectly all right with me, your Honor. I am all through except for one witness, but I would like it to be understood that if Mr. Herwitz is going into those negotiations, that he is now on direct examination on his own case and that I am going to have an opportunity to cross examine Mr. Sullivan.

864

The Court: I have intimated, I think, that the question put by Mr. Herwitz was not a question which could be regarded as proper cross examination. Then Mr. Herwitz suggested that he would like to ask the witness some questions even though he made him his own witness, and he asked me whether he should do it now. I thought he should do it now so as to save Mr. Sullivan coming back.

Mr. Bruce: Well, I want to accommodate Mr. Sullivan. I merely want it understood that I have a right to cross examine from this point on. If he would prefer to call him in order after I finish my case, which I am about to finish, Mr. Sullivan won't be—

Mr. Herwitz: Will it be just a minute?

Mr. Bruce: Yes, just two questions to another witness and a request from you.

Mr. Herwitz: All right. Suppose I withdraw or let Mr. Bruce withdraw his witness and let him finish his case.

• *Defendants' Witness, William D. Rawlins, Direct*

865

Mr. Bruce: Now I move to strike out the answer of the witness to that question—that question and answer.

Mr. Herwitz: I do not think there is any necessity of striking out that answer.

Mr. Bruce: Well, what was the answer?

The Court: The answer was "No," I think.

Mr. Herwitz: Yes.

Mr. Bruce: "No, but it related to negotiations, I think.

The Court: Well, I think you are right. That should not be part of your examination, as it will appear to be in the record.

866

Mr. Bruce: That is correct.

Mr. Herwitz: All right.

Mr. Bruce: You can reframe it later.

Mr. Herwitz: All right. Step down, Mr. Sullivan.

(Witness excused.)

WILLIAM D. RAWLINS, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

867

*Direct Examination by Mr. Bruce:*

Q. Mr. Rawlins, what is your present position? A. I am the executive secretary of the Realty Advisory Board on Labor Relations.

Q. Having an office where? A. 12 East 41st Street, Manhattan.

Q. In the so-called Real Estate Board Building? A. That is right.

Q. Will you tell the Court briefly what the Realty Advisory Board on Labor Relations is? A. Well, it is

868 *Defendants' Witness, William D. Rawlins, Direct*

a voluntary membership association of the owners of office, loft and apartment buildings located in the Borough of Manhattan.

Q. Organized for the purpose, is it not, Mr. Rawlins, primarily of advising the owners of real property in Manhattan in connection with labor relations problems?

A. That is right; to negotiate these contracts and administer them.

Q. Is it fair to say that in a sense the Realty Board is a union of employers?

869

Mr. Herwitz: I object, your Honor.

The Court: I think the objection should be sustained.

Mr. Bruce: The only reason I asked that question is you have heard a great deal lately, your Honor, about collective bargaining, and the unions of employers to bargain with unions of employees.

The Court: Yes. I understand why you asked the question, more or less, but in the face of objection I think I had better sustain it.

870

Q. Mr. Rawlins, you held the same position, did you not, in December of 1938 and January and February of 1939? A. I did.

Q. And as the executive secretary of the Realty Advisory Board did you attend certain meetings looking toward the renewal of the so-called Extended Mahoney Agreement in the Garment Center? A. I did.

Q. Did you take minutes of those meetings for the negotiating committees of the Penn Zone and Mid-Town Associations when you were present? A. Well, I took notes of various things that were said during the negotiations. When I got back to the office I dictated what I had in my mind in connection with that.

Q. And you made those minutes not for both groups but for the members of the negotiating committee, did you not? A. That is right.



*Defendants' Witness, William D. Rawlins, Director* 871

Q. I show you Plaintiff's Exhibits 7 to 11 inclusive and Defendants' Exhibit I and ask you whether those are true copies of minutes that you dictated after those negotiation meetings (handing to witness)? A. They seem to be, yes. I would say they were.

Q. Do you recall, Mr. Rawlins, independent of those minutes, whether or not there was any discussion during the negotiations leading up to the McGrady Agreement of wage and hour laws? A. Why, very decidedly there was.

Mr. Herwitz: I move to strike out "very decidedly." 872

Mr. Bruce: We consent to that.

Q. In what connection did this discussion arise? A. Well, it was during the negotiations—

Mr. Herwitz: Of course, I make the same objection to this entire line of testimony.

The Court: Yes, Mr. Herwitz. Your objection will be noted.

A. Well, what happened was this: We were sitting around the table and the question came up about the hours, and so forth, and I precipitated the discussion about the Wage and Hour Act. I was very much disturbed over the fact that at that time there had been introduced into the Legislature at Albany a bill that was very similar to the Federal Wage and Hour Act, or the Federal Fair Labor Standards Act, to give it its proper title. We had gone there to make a contract for so many hours of work for so many dollars, and I had the feeling— 873

Mr. Herwitz: I am objecting, your Honor, to the feelings of this witness.

Q. Tell what you stated in substance. A. Well, what I said to the negotiators there at the meeting, that if

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*Defendants' Witness, William D. Rawlins, Direct*

this State act was enacted it would mean our contract would go out of the window, and somebody said—I have forgotten just who; it was either Mr. Bambrick or Mr. Maguire—he said, “You don’t mean the Federal Act!” and I said, “No, I don’t think the Federal act applies.” And it was the concensus of everybody, it was discussed very briefly, and it was passed over as something that did not affect the building service employees in the buildings of Manhattan. Our whole concern was with the possibility of the enactment of the State act.

875

Q. The people who were present at that meeting representing the union are correctly set forth, are they not, on the copies of the minutes of those meetings? A. Well, there may have been some additional people representing the union because in most of those meetings, except toward the end, there usually was—well, they spoke of it sometimes as the scale committee or as the rank and file committee, and, oh, sometimes there were a dozen of them in addition to the names I put down on the report.

Q. But these were the important officers of the union that you listed? A. That is right.

876

Q. Throughout these negotiations and right up to the time when you went before Mr. McGrady in February, 1939, what was the position of the union with respect to the possible passage of a State wage and hour act? A. Well, they figured—they argued that if there was such an act passed that they should get the benefit of it.

Q. Automatically? A. Automatically. They did not want to make any provision to protect us against that State act.

Q. And what provision did the employers insist upon? A. Well, we insisted that there be some clause that would give us protection. It was to be worked out by the attorneys.

*Defendants' Witness, William D. Rawlins, Direct*

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Q. You wanted the contract to be reopened in that event, did you not, for discussion? A. Yes. That is what was finally decided upon by the attorneys.

Mr. Herwitz: I object to the answer on the ground that it is not responsive, your Honor.

The Court: It is not responsive.

Mr. Bruce: That is true.

Read the question.

Mr. Herwitz: I move to strike it out.

Mr. Bruce: All right; strike it out.

The Witness: What is the question now?

878

Mr. Bruce: Strike out the answer and read the question to the witness, will you, please, Mr. Stenographer.

Q. (Read.) A. Yes.

Q. And Mr. McGrady in his award denied the union its proposed clause and substituted a clause which was incorporated in the McGrady Agreement, permitting the agreement to be reopened in the event of the passage of any wage and hour act; is that correct?

Mr. Herwitz: I object to that on the ground that Mr. McGrady's decision and his comments are in evidence and this witness should not be allowed to characterize them.

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Mr. Bruce: I guess you are turning my clubs against me, aren't you?

Mr. Herwitz: Well, they are usually pretty weak ones, but this one is a good one.

Mr. Bruce: Well, I think it ought to be answered then.

Mr. Herwitz: I am objecting to this witness telling us what Mr. McGrady decided when we have in evidence the McGrady Agreement.

The Court: That is a good objection.

Mr. Bruce: That is all.

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*Plaintiff's Witness, David Sullivan, Direct*

Mr. Herwitz: Now, if your Honor please, as is customary in these things, our expectations do not work out. While Mr. Bruce may only have had ten minutes' questioning with Mr. Rawlins, I am afraid that I cannot confine myself to or limit myself to cross examining him for ten minutes. Now I am in this quandary. Mr. Sullivan, at Mr. Bruce's request, has been here almost continuously since Tuesday—

The Court: Well, what are you getting at?

881

Mr. Herwitz: I would like to recall Mr. Sullivan out of order.

The Court: I have no objection. It is purely a matter of convenience. Is there any objection to that?

Mr. Bruce: I haven't any objection to that, your Honor. I merely wanted it to be understood that when Mr. Sullivan is being called he is being called on Mr. Herwitz's rebuttal.

The Court: I think we have covered that point. That was understood.

Mr. Herwitz: All right.

882

The Court: Very well. Mr. Rawlins, you are apparently going to be sacrificed for the time being.

The Witness: Well, I am used to it.

(Witness temporarily excused.)

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DAVID SULLIVAN, called as a witness on behalf of the plaintiff in rebuttal, being previously sworn, testified as follows:

*Direct Examination by Mr. Herwitz:*

Q. Mr. Sullivan, did you in the course of the McGrady negotiations or in the negotiations leading up to the

*Plaintiff's Witness, David Sullivan; Direct*

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McGrady Agreement ever say in words or substance that the Federal Fair Labor Standards Act did not apply to loft building service employees? A. No.

Q. In your presence did Mr. Edward C. Maguire, the present City Magistrate, then counsel to Local 32-B, make any such remark? A. No.

Q. Did any member of the Negotiating Committee of Local 32-B make any such remark? A. No.

Mr. Herwitz: That is all.

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New York, February 15, 1943, 10:30 A. M.

Trial resumed.

Mr. Herwitz: If your Honor please, much as I regret to ask your Honor and the attorney for the defendants to vary the order of proof, I would like to ask the Court's indulgence and my adversary's consent to allow me to call out of order Magistrate Edward Maguire, who has kindly consented to come down here today and who, in addition to his duties as Magistrate, also performs his onerous task of being the labor adviser to the Mayor, I believe. I think in the interests of public service—

885

The Court: I think we should be very glad to extend that courtesy.

Mr. Bruce: Certainly, your Honor. There is no need for argument on it.

Mr. Herwitz: Thank you very much. Then if I may call Judge Maguire at this time.



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*Plaintiff's Witness, Edward C. Maguire, Direct*

EDWARD C. MAGUIRE, called as a witness on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

*Direct Examination by Mr. Herwitz:*

Q. Judge, what is your present position? A. City Magistrate.

Q. And in addition to being City Magistrate, do you perform any other public service? A. Well, I am not the labor-advisor to the Mayor as such, that you are referring to, but at times he does consult me.

887

Q. I see. Judge, prior to your appointment as City Magistrate and for an extended period of time, were you the attorney for Local 32-B of the Building Service Employees Union? A. My firm, Rice & Maguire, were the attorneys for the union.

Q. Did you personally have general charge of the handling of that client? A. Yes, I did.

Q. Were you or was your firm the attorney for Local 32-B in the years 1938, 1939, 1940 and 1941? A. Yes.

Q. And did your firm continue in that capacity until December 31, 1941? A. December 31, 1941, is right.

888

Q. Do you recall, Judge, that in 1939 a certain collective bargaining agreement known as the McGrady Agreement, was entered into between Local 32-B and the Midtown Realty Owners Association and the Penn Zone Association? A. I do.

Q. Prior to the entering into of that collective bargaining agreement, were there various negotiations between the union on the one hand and the association on the other? A. There were a number of conferences.

Q. Yes. Will you state whether or not you attended these conferences? A. I did.

*Plaintiff's Witness, Edward C. Maguire, Direct*

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Q. Could you say now whether or not you attended all of them? A. I think I did.

Q. Do you recall that the first of the conferences leading up to and culminating in the so-called McGrady Agreement, took place some time in the month of December, 1938? A. Yes.

Q. Do you recall who was present at these various conferences? A. Well, now, having refreshed my recollection from the bound volume that I made up after the negotiations, I know that there were several conferences that took place in December of 1938, that were held at the Garment Center Capital Club, and amongst those that were present were Mel Brown, Leon Spear, Lawrence Mayer, and I think Mr. Kheel attended some of them.

890

Q. Samuel Kheel? A. Well, I don't recall his first name.

Q. Yes. A. And I believe at some of them Henry Clifton representing the Associations, was there.

On behalf of the union there was Mr. Bambrick, two or three or possibly more other representatives of the union, and I was there as their counsel.

Q. Do you know whether Mr. Hareckham attended any of these conferences? A. He probably did.

891

Q. And do you recall whether Mr. Severino, Manuel Severino, attended any of these conferences? A. That I do not recall.

Q. Do you recall whether or not Mr. Thomas Young attended any of these conferences? A. Yes, I think he was there.

Q. Do you know whether Mr. Seeman of Local 164 attended any of these conferences? A. Yes, they had a representative present.

Q. Do you remember Mr. Healy, counsel of Local 164, attending any of these conferences? A. He attended some of them.

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*Plaintiff's Witness, Edward C. Maguire, Direct*

Q. Which Mr. Healy is that, do you know? A. He is in the army now. He had a law office up around Fifth Avenue, if I recall correctly, and he represented the superintendents.

Q. You do not happen to know where he is now, I suppose? A. The last I heard of him, he was down in New Orleans.

Q. Do you know Mr. Perry, of Local 32-J, whether he attended any of these conferences? A. Yes, he attended some of them.

893

Q. Did you mention Mr. Rawlins? A. Oh, yes, Mr. Rawlins was there.

Q. Did Mr. Merritt, Walter Gordon Merritt, attend any of these conferences? A. Well, he did attend some, but I think Henry Clifton attended others. I think in the first one or two, Mr. Clifton was there.

Q. Do you know whether Mr. Thomas Shortman was there in attendance? A. I think he was.

Q. Attended any of these conferences? A. I think he did.

Q. You have mentioned David Sullivan? A. Yes.

Q. You have mentioned Mr. Spear, have you not? A. Yes.

894

Q. Do you remember whether Mr. Becker of the Midtown Realty Owners Association attended any of the conferences? A. I know that he did attend some of them.

Q. Is that Timothy Healy, the attorney, you referred to? A. That is right.

Q. Judge, I show you Plaintiff's Exhibit 7, purporting to be certain minutes taken of the first conference on December 21, 1938, and call your attention specifically to sheet number 2 of this exhibit under the heading:

*Plaintiff's Witness, Edward C. Maguire, Direct*

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"No. 2, Wages and Hours," and I ask you to read it and tell me whether or not it refreshes your recollection as to the discussion which took place at that first meeting concerning that subject-matter, to wit, wages and hours (handing). A. Well, I know, I do recall this, that the union had presented what it termed "certain demands" with reference to wages and hours, and the employers rejected the demands as to both:

Q. Yes; I am particularly interested, Judge, in the statement of Mr. Bambrick concerning the relative interest of the union in wages and hours, if you recall? A. No, I do not recall the reference to Mr. Bambrick making that statement.

896

Mr. Herwitz: So that the Court may know what we are referring to—

The Court: You are referring to Exhibit 7, December 21, 1938, in the conference with the realty owners?

Mr. Herwitz: That is correct, and I want to ask this witness whether he recalls this statement being made—if he recalls.

Mr. Bruce: Your Honor, the witness has just read the document and his recollection has not been refreshed. He stated so positively, and Mr. Herwitz is trying to pound something into him that is not there.

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Mr. Herwitz: Not at all.

The Court: I take it that Judge Maguire either remembers or he does not.

Mr. Herwitz: I merely want to call your Honor's attention to what he does not recall. I am not trying to pound it into him, but I wanted you to know what he did not recall.

The Court: Yes.

898

*Plaintiff's Witness, Edward C. Maguire, Direct*

Q. If it will be any better, if you will look at this, are you referring to paragraph number 2—are you not, Judge (handing)? A. Yes, that is right.

Q. You merely said as to paragraph number 2 appearing on sheet number 2 that you did not recall that statement being made? A. And then I think there is in paragraph 3 the reference to Mr. Shortman stating that under no circumstances would the union arbitrate that question.

899

Q. Judge, do you recall whether there was any discussion at the first meeting concerning the applicability of the Fair Labor Standards Act, otherwise known as the Federal Wage and Hour Law, to the employees involved in that dispute?

Mr. Bruce: Just one moment. Are you referring to the first meeting?

Mr. Herwitz: The first meeting. That is the question I put.

The Court: That is the meeting of December 21?

Mr. Herwitz: That is correct.

900

Mr. Bruce: But that, your Honor, is not the first meeting. The minutes clearly indicate. That is what I was driving at.

Mr. Herwitz: Well, if that is an issue, I will merely put the question as to December 21.

A. Now, there were a number of meetings.

Q. Yes. A. I doubt if there were any meetings before December 21, although I am not sure of that. But I know that at some of the meetings which took place in December there were discussions as to the application of the Wage and Hour Act, the Federal Act.

Q. Will you tell the Court the substance, the effect of those discussions as you now recall? A. Well, one of the union's demands, as I recall it, was that in the event



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that through any law or the application of any law, the hours of the employees should be reduced, that there would be no reduction in wages. Well, that is about the substance of it.

Q. Yes. A. That was the demand of the union. It was not extensively discussed in December, if I recall correctly, and I think I do, that several of the employers' representatives, possibly Henry Clifton, may have said that they couldn't envision the Federal Wage and Hour Act applying in this particular instance. The position of the union was this, that the lay representatives there insisted or indicated—I won't say they insisted, but they indicated their beliefs that the Wage and Hour Act might be held to apply, but in any event the general position I took was that whatever the rights of the men were under that Act or any State Act which might supplement it, they should be preserved to them.

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Q. You have just said that you thought there was little discussion along the lines you have indicated in the early part of the negotiations. A. In December.

Q. Yes. A. And then I think there was a break, a long lapse in the conferences.

Q. Do you recall, Judge, that the union's original demands called for a 40-hour week? A. That is correct.

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Q. Do you remember whether there was any compromise proposal by the union subsequent to their original demand for a 40-hour week? A. Unless I could find it in the record of the complete matter, why—

Q. I am just asking you whether you recall at a time subsequent to the date of the original demand for a 40-hour week there was an offer to compromise for 44 hours per week on the part of the union? A. Well, you will have me speculating—

Q. Well, I don't want you to. A. I haven't any doubt in the course of the negotiations both sides tended to make offers, although I do not think in this instance the

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employers offered anything excepting minor conditions, such as workingmen's clothes being maintained and the like of that. They made no contention, so far as I can recall, with reference to wages or hours until the negotiations went on in the course of the strike.

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Q. Yes, but I was not asking you about compromises or compromise offers by the employers. I was asking you about whether you recall any compromise offers having been made by the union? A. I do not think in the course of the negotiations in December that the union made any compromise offers because they had been met with a direct rejection on every major point by the employers in those conferences.

Q. Do you recall that the union in the course of the strike that ultimately took place, signed individual agreements with individual buildings? A. Yes, that is correct.

Q. Judge, in connection with this question I have just put to you about compromise offers, I ask you to look at this bound volume of the proceedings which you previously referred to, and especially to a certain article appearing in the New York World-Telegram. A. You mean my bound volume?

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Q. Your bound volume. A. Yes.

Q. And ask you whether that tends to refresh your recollection (handing)? A. Well, that was during the course of the strike.

Q. Yes, that is right. A. Not to be troublesome, but don't you have any of those agreements?

Q. No, I don't. A. Because it would have been a case of me preparing them, and that would be the better way rather than that article there.

Mr. Bruce: The question was, did this refresh the witness's recollection. I do not think the answer was quite responsive.

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The Witness: Well, as a matter of fact I do think—I am fairly certain that when the strike was on with the associations and their members, that the union sought to effect agreements with individual owners who were not members of the association and that they did offer compromises of a 44-hour week.

Q. Yes.

The Court: Who offered the compromises, Judge, the union?

The Witness: Yes.

The Court: The union or the employers?

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The Witness: The union. The way they did it was this, your Honor: when it seemed inevitable that there was going to be a strike, they did prepare certain forms of agreements and approached those who were not members of the association in an effort to limit the number of buildings that would go on strike, where the men would go on strike.

The Court: That was prepared by the union?

The Witness: Yes.

Q. Would you say that you now recall, if you do, Judge— A. Yes, that is the fact.

Q.—that the union relaxed on its original demands for a 40-hour week and offered to compromise as far as hours were concerned, on a 44-hour week? A. That is right.

909

Q. That offer to compromise came some time around February 1st of 1939? A. Yes. As a matter of fact it was—the efforts were made to sign up these independent owners, that is, those not connected with the associations, probably a couple of days before February 1st, so as to enable them to avoid a strike, and on February 1st and during the strike.

Q. Can you tell us, Judge, whether or not the realty

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owners at that time, prior to the actual strike, had offered anything in the way of an hourly reduction?

Mr. Bruce: Your Honor, I do not understand the question. Do you mean a reduction of hours or do you mean a reduction in the work week?

Mr. Herwitz: A reduction of that part of the Extended Mahoney Agreement which provided for a maximum workweek of 48 hours a week.

Mr. Bruce: I see. That is clear.

911

Mr. Herwitz: On a straight time basis and thereafter on time and a half. I think we all understand that.

Mr. Bruce: I did not understand it.

A. The owners had not made any offer with reference to a reduction of hours or an increase in salary prior to the strike.

Q. Do you recall whether or not after the strike took place that the owners did make any offer? A. Again, I am almost positive that they did not make any offer with reference to the reduction of hours or an increase of wages.

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Q. Judge, I would like to show you something that appears in your bound volume and ask you whether or not you can explain what it means? I frankly do not know.

Mr. Bruce: Your Honor, I think that is hardly a proper way to proceed. Ask a question. If the witness needs to refresh his recollection, all right, but just do not show him a whole volume carte blanche.

Mr. Herwitz: I am not doing that carte blanche. I am showing him a particular page.

Mr. Bruce: Ask him if he needs to refresh his recollection. If he does, then you can use the volume.

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Mr. Herwitz: I think Mr. Bruce failed to recall that I asked the witness whether he recalled and he said he did not. I now offer to show him, which may or may not refresh his recollection.

Mr. Bruce: Well, ask him what will refresh his recollection.

The Witness: As to what particular thing?

Q. As to the question of whether or not there was any offer by the employers? A. I still feel that there was no offer made by the employers.

Q. Yes. A. Until the Mayor imposed the settlement on both parties. 914

Q. Will you look at this, Judge? I show you a certain page and ask you whether—

Mr. Bruce: I object to that. Will you ask—

Mr. Herwitz: Can you wait until I finish my question?

Mr. Bruce: All right.

Q. I ask you whether or not it tends to refresh your recollection on the question that I have just asked you (handing)?

Mr. Herwitz: Any objection? 915

Mr. Bruce: I thought the witness said he was quite positive.

Mr. Herwitz: That is right.

Mr. Bruce: That the owners hadn't made any. I do not see any need for any—

Mr. Herwitz: I am not trying to impeach him. I just want to make sure that he has all the facts and data before him so that he can give us the true picture, which I am sure he wants to do and which I am sure the Judge wants to hear.

Mr. Bruce: Well, I want to hear, too, but I thought the answer was quite positive that the owners had not made any offer.



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The Court: I think in the interest of getting at the facts it would be well to allow Judge Maguire to look at the minutes, if he thinks that will assist him in recollecting it. Do you think so, Judge?

The Witness: It may.

Mr. Bruce: I withdraw my objection.

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The Court: It is quite true what Mr. Bruce says, that Judge Maguire said no, but let us get at the facts or let him get at them. Let the record show what you submitted to the Judge to look at, Mr. Herwitz.

Mr. Herwitz: Judge, may I just say this: I do not know whether or not the answer should be yes or no. I am merely trying to get the facts for what they are worth.

The Court: Let the record indicate what you are showing Judge Maguire.

Mr. Herwitz: Yes. I would like to offer this for the purpose of identification.

The Court: I am not suggesting you offer it, but merely that the record indicate what you have shown to him.

918

Q. Will you, for the record, tell the Court what you are being shown? A. It is a sheet headed "Garment Center Negotiations, 1939, Proposal made at the Mayor's Office, February 2, 1939, by Mr. Merritt." The sheet is in the bound volume which covers the proceedings that took place in 1938 and 1939, leading up to the conclusion of the McGrady Award.

Mr. Bruce: Your Honor, the witness has said that it may aid him in refreshing his recollection as to this period, and I withdraw my objection.

The Court: Very well.

A. Now I still maintain—

Q. Yes? A. That that was not a proposal by the employers, and if you want the facts as to how that was written, I will tell you.

Q. Yes, I would like to know that because I did not understand it myself. A. The strike occurred on the morning of February 1st. The Mayor was out of the City, and he requested both sides to meet with Stanley Isaacs, then the Borough President of the Borough of Manhattan. We met with Stanley Isaacs in the Municipal Building, and in the course of the day Mr. Zimmerman—

Q. Of the Dressmakers' Union? A. —of the I. L. G. U., came in, and made demands that both parties should settle because a very considerable number of lady garment workers were being kept out of work by this thing. On February 2 the Mayor was back in New York. We had conferred, I believe, in the morning with Borough President Isaacs and then adjourned over to City Hall. The Mayor was there, and Arthur Meyer, Chairman of the State Mediation Board, I believe, was also there, and it was on the evening of the 2nd when the Mayor summoned both parties into his room in City Hall and announced what he said was going to be the settlement, and then gave both sides two hours to report back to him as to whether or not that was—as to whether or not they agreed to it. At that time Mr. Merritt made the statement to the Mayor that this was a Munich pact being forced upon the employers, and at the same time the union representatives felt it was being imposed on them also. The union asked for the opportunity of going up to the Capitol Hotel to meet with its shop stewards who were waiting there to consider what developments had occurred, and at nine o'clock that night we reconvened again in City Hall, both sides, and in the interim Mr. Merritt had prepared that (indicating), and his people had said that they would accept it even though they called it a Munich pact.

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Q. In other words, Judge, this proposal of Mr. Merritt's followed the Mayor's waiving of the big stick, I think you would characterize it, is that about right?  
A. That is right.

Q. And this proposal by Mr. Merritt came in the manner you have just described? A. That is right.

Mr. Herwitz: Under these circumstances I offer—well, withdrawn.

Mr. Bruce: May I see that, Mr. Herwitz, the reference to the proposals?

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Mr. Herwitz: Yes.

Mr. Bruce: It is not in evidence.

Mr. Herwitz: No. Well, I will offer this as Plaintiff's Exhibit 18, and ask that it be considered marked, and I will have a photostat obtained, with defendants' permission. The exhibit purports to be a proposal made at the Mayor's office, February 2, 1939, by Mr. Merritt, and is entitled "Garment Center Negotiations, 1939."

Mr. Bruce: No objection.

(Deemed marked Plaintiff's Exhibit 18.)

Mr. Herwitz: So that the Court understands, I would like to read this proposal which is very brief:

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"I.

"a.—3-year agreement.

"b.—One dollar flat increase to last for the first 18 months.

"c.—Arbitrate wages at end of first eighteen months to prevail for last eighteen months' of agreement.

"d.—47 hours per week for first 18 months, 46 hours per week for second 18 months.

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"e.—Other minor details to be negotiated, and, if no agreement, submit it to someone appointed by the Mayor or S. M. B."

Q. That would be the State Mediation Board? A. That is right.

Mr. Herwitz (continuing):

"to try and cause an agreement, or

"II.

"open arbitration on all points."

926

Q. Now, Judge, was the first of these proposals the basis of the ultimate settlement between the parties? A. That is right.

Q. You say that this settlement was characterized by the realty owners as a Munich pact? A. That is right.

Q. And how was it characterized by the union? A. Well, they did not use such polite language that they did, but on the next day voted to accept it.

Q. Did you attend the membership meeting at which the vote took place? A. Yes.

Q. Would you describe what took place?

Mr. Bruce: Where was this held, and when, and were any of the owners present? 927

A. No, none of the owners were present.

Mr. Bruce: All right.

A. (Continuing) It was held on February 3, on the morning—

Mr. Bruce: I think that disposes of the question, your Honor. I object to it.

Mr. Herwitz: Under ordinary circumstances, your Honor, I would certainly agree with my friend, but the door, I think has been opened by him in many respects, but I will withdraw the question.

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The Court: Yes. I should not think it was opened in this respect, conversations between the parties at which the defendants were not present.

Mr. Bruce: I might say that the door on that subject was opened by Mr. Herwitz when he offered the minutes kept by the owners.

Mr. Herwitz: I do not see what more I can do except withdraw a question, your Honor.

The Court: Go ahead.

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Q. Prior to this settlement that took place as you have described, can you say whether or not you, as counsel of Local 32-B, ever made the statement at any of these negotiations, in words or in substance, that the Fair Labor Standards Act, otherwise known as the Wage and Hour Law, did not apply to the employees involved in that dispute? A. I never did.

Q. Did you ever, subsequent to the settlement, and prior to the actual entering into of the contract—

Mr. Bruce: Which contract?

Q. —otherwise known as the McGrady Agreement, make any such statement? A. You are now referring to the settlement brought about by the Mayor?

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Q. Correct. A. And the time of the conclusion of the McGrady award?

Q. Yes? A. I did not.

Q. So that we complete the record, Judge, is it your statement that at no time during the course of the entire negotiations from December, 1938, to the time when this contract was ultimately entered into, this collective bargaining agreement known as the McGrady agreement, at no time did you say in words or substance that the Fair Labor Standards Act, otherwise known as the Wage and Hour Law, did not apply to the employees involved in that dispute? A. I never said any such thing.



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Q. Did you ever hear any officer or official of the union, or anybody connected with the union, say at any of these conferences that the Fair Labor Standards Act or the Wage and Hour Law, did not apply to the employees involved in that dispute? A. No.

Mr. Bruce: Just a minute. I think I know what you mean by "these conferences" but I think the question ought to indicate the date because there have been a lot of conferences referred to. Put a terminal date on it.

Q. At the conferences leading up to and culminating in the McGrady agreement, from December, 1938, to the end of February, 1939? A. No, I did not.

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Q. I call your attention specifically to Mr. James J. Bambrick, the then president of Local 32-B, and I ask you whether you, at any time in the course of those conferences commencing on or about December 19, 1938, and culminating in the signing of the McGrady agreement on or about February 18, 1939, whether you ever heard said James J. Bambrick say in words or substance or effect that the Fair Labor Standards Act, otherwise known as the Wage and Hour Law, did not apply to the employees involved in that dispute? A. I did not.

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Q. And is your testimony the same as regards Mr. David Sullivan, the then secretary-treasurer? A. That is right.

Q. Of Local 32-B? A. Yes.

Q. And is your testimony the same as regards Thomas Shortman, the then chairman of Council No. 3? A. My testimony is the same as to all the officials that I ever heard at those conferences.

Q. Judge, prior to your going on the bench, had you represented a great number of labor unions? A. Yes, quite a few.

Q. At the time of these conferences had you for many

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years had experience as an attorney representing labor unions? A. Yes.

Q. Were you counsel to the Central Trades and Labor Council of New York City? A. Yes.

Q. And were you counsel to numerous teamsters' unions in New York City? A. Yes.

Q. And had you, for the past—is it fifteen years, Judge, or it is more—represented various labor unions? A. Approximately fourteen or fifteen years.

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Q. Judge, did you make it your business to be familiar with all laws affecting labor? A. I certainly tried to.

Q. And did that include the Wage and Hour Law? A. That is right.

Q. Following the settlement that was made at the Mayor's office, was there an arbitration of certain other differences existing between the parties before Edward McGrady? A. Well, it wasn't what you would call the form of an arbitration.

Q. Yes? A. I know that once or twice both parties visited Edward McGrady up in the RCA Building and then we had an agreement that either party could go in and discuss particular things with him. There was nothing formal about it. Eventually he did make an award.

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Q. Would you say that he was primarily a mediator between the parties? A. I think so, yes.

Q. And would it be correct to say that the parties agreed, however, to allow him to decide any differences that they themselves were not able to decide? A. No. I think this, that as a result of the Mayor's settlement, both parties agreed that he would mediate, but the course which he preferred to follow was to conciliate in as many instances as he could and then only arbitrate and decide the few points that were outstanding.

Mr. Herwitz: Do you have the McGrady award, Mr. Bruce?

The Witness: It is in that book (indicating).

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Mr. Herwitz: Yes, but we have it in evidence, Judge.

(Mr. Bruce hands same to Mr. Herwitz.)

Q. Will you please look at Defendants' Exhibit F, under Point of Difference A, and to refresh your recollection, will you read that part of it to yourself. Then I intend to address some questions to you relative to it (handing).

A. The first paragraph?

Q. All parts under point of difference A, Judge. A. (After examining) Yes.

Q. Did you or your firm submit to Mr. McGrady a proposed contract? A. Well, we did not do it exactly that way. We had this original meeting with Mr. McGrady. There may have been one or two of them, and prior to that he had asked counsel and the committees to get together and try to limit the number of matters that would be brought to him, and we did resolve a good many of the differences directly. Then the things that we could not agree upon were submitted to him, and they were called "points of difference."

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Q. Yes. A. And that refers to those points.

Q. Did you prepare for Local 32-B and submit to Mr. McGrady for inclusion in the contract, the following provision:

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"If during the period hereof, by any law, the hours of employment are reduced below the hours provided for herein, then this agreement shall be deemed to be and be amended to provide that hours of employment hereof, including relief periods, shall be as prescribed by such law or laws without any diminution of wage rates."

A. I did.

Q. Will you tell the Court whether or not the phrase "by any law" was intended to be a reference to future State legislation or to the Wage and Hour Law, the Federal Wage and Hour Law, and future State legislation?

A. It was intended to mean what it says, "any law."

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Q. And would that include the Federal Fair Labor Standards Act then on the books? A. Any law would, Mr. Herwitz.

Q. Yes. A. It was written deliberately for that purpose, of including any existing law or any law that might later be enacted.

Q. Yes.

Mr. Bruce: Your Honor, I move to strike out the word "deliberately."

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The Court: I do not think it adds anything particularly to it.

Mr. Herwitz: If your Honor please, the question involved and raised by the defendants' answer is as to the intentions of the parties at the time this contract was entered into. There has been some dispute—

The Court: Let us strike it out if there is any question about it. It does not amount to a great deal. It was written for that purpose, he says.

Mr. Herwitz: Very well.

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Q. In connection with the purpose of the submission of this paragraph to Mr. McGrady, did you submit a brief memorandum in support of your proposals? A. That is right.

Q. I show you now Plaintiff's Exhibit 13, and ask you whether that is the memorandum or a copy thereof that was submitted? It was prepared by me and submitted by me.

Q. And is it a fact that that part of Plaintiff's Exhibit 13 under the heading of "Point of Difference 'A' " refers to the provision which I have just read, which was submitted to Mr. McGrady for inclusion in the contract? A. Yes.

Q. I call your attention to the words included in your memorandum, reading: "That which would be intended

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by such a law or the application of existing laws"—and ask you whether or not the phrase "or the application of existing laws" was intended by you to refer to the Federal Fair Labor Standards Act? A. It was.

Q. I call your attention, Judge, to that part of Defendants' Exhibit F, the McGrady decision, and that sentence following the statement of the provision proposed by the union—I refer to this sentence: "The parties differ as to the necessity for this paragraph." I ask you whether you differed as to the necessity of the paragraph that you proposed having included in the contract? A. I differed with the employers.

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Q. Yes. But is it not a fact that you were in favor of the inclusion of this paragraph which I have just read to you? A. Yes.

Q. And did you contend that it was necessary? A. Yes.

Q. Did the employers take an opposite view? A. They did.

Q. Do you recall what they said concerning it? A. Yes.

Q. What was that? A. This is in substance now. I believe I am accurate in attributing it to Henry Clifton. The opinion was expressed by the owners or their counsel—I think it was their counsel—that the Wage and Hour Act would not be held to apply to the Building Service Employees situation here. I refused to concede that, and said that whatever the protection was, I mean whatever rights they had, at least they should be guaranteed their rights and they should not be waived, and that is the reason I asked for that particular provision that you have referred to before, and I opposed the other one. Now, frankly, I did not know whether or not it was going to apply:

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Q. Yes, but the answer to that is you did not know what the Supreme Court would hold; is that the size of it, Judge Maguire? A. That is right.

Q. And you never made any claim one way or the other



with regard to it, as to what the Supreme Court would hold as to the applicability of the Act? A. I did not discuss it to that Act. I did not know what it was going to hold, but I certainly never waived the rights of the men under it. They had the feeling, and by that I mean they at some time said it, that the only way it could apply was not the Federal law but if there was an extension by the enactment of the State law to supplement it.

Q. That was their claim? A. That was their contention.

Q. But that was not your contention? A. It certainly was not.

Q. Did your firm subsequently cooperate with the Wage and Hour Division of the Department of Labor in preparing and prosecuting the case against the Arsenal Building Corporation? A. Yes.

Q. Did that prosecution follow, Judge, a visit which you and various representatives of the union made to Washington to confer with the Wage and Hour Administrator? A. That is right.

Q. Do you recall when that visit was made, Judge? A. No, I do not.

Q. Would it refresh your recollection if I asked you whether or not it was sometime in October or November of 1939? A. Well, I wouldn't want to hazard a guess.

Q. I will call your attention, Judge, to the fact that the suit against the Arsenal Building was commenced on March 22, 1940, and I will ask you whether or not, having that in mind, you are able to say when or about when you made that trip to Washington? A. Well, I think it probably was around the time you mentioned.

Q. Yes. A. I know there was a lapse between the time of the presentation or the institution of the Arsenal case. As a matter of fact, my office prepared the Arsenal case under my direction or did the preparation of the work of it, and then turned it over to the Wage and Hour Division.

Q. Yes. Did your office ever appear in the case as *amicus curiae*? A. No, not formally, but we did have a representative in the court to observe.

Q. Yes. Your office made no secret about the fact that it was doing that, did it? A. No. As a matter of fact, Harold Berg of my office interviewed, I think, practically all of the men in the building, took affidavits from them, statements, and then eventually I had one conference, one or two conferences with the Wage and Hour Administrator here, and then Berg carried on the rest of it.

Q. Yes. I think I failed to ask you, Judge, whether or not Mr. Harold Berg of your office was present at any of those conferences leading up to the McGrady agreement? A. I do not think so.

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Q. You are not sure about that? A. I don't believe so.

Q. Then at least sometime prior to March, 1940, your office in its capacity as counsel of Local 32-B, aided and assisted the Government in the preparation of the case against the Arsenal Building? A. We did.

Q. Were you a witness, Judge, in any of the Wage and Hour cases? A. Yes.

Q. In which case? A. The one in Philadelphia.

Q. That was the so-called Kirschbaum case, was it not? A. That is right.

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Q. Virtually a companion case of the Arsenal Building case? A. So the Wage and Hour Division considered.

Q. Yes. A. They requested me to go down to Philadelphia, and I believe Mr. Sullivan also went down with me.

Q. When was that, Judge? A. It was prior to the institution, if I recall correctly, of the Arsenal case. As a matter of fact, certainly prior to the trial of the Arsenal case.

Q. As I recall it—just see whether I am correct—the decision in the Kirschbaum case, that is, Judge Kirkpatrick's decision, who was the trial judge, came out a

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very few days before the decision of Judge Woolsey in the Arsenal Building case, do you recall that?

The Court: Well, there isn't any doubt that that is correct, is there?

Mr. Herwitz: That is correct, your Honor.

The Court: I think Judge Woolsey refers to it, does he not, in his opinion?

Mr. Herwitz: That is correct, your Honor.

Q. So that your testimony in the Kirschbaum case was whenever it took place, is that about right? A. Yes.

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Mr. Herwitz: That is all.

*Cross Examination by Mr. Bruce:*

Q. Judge Maguire, for what purpose were you called as a witness in the Philadelphia case, will you tell us? A. Well, if you will—

Mr. Herwitz: I object to that question, your Honor.

A. Yes, I can recall.

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Mr. Herwitz: May I object to that question, your Honor. I object to asking the Judge for what purpose the Government called him.

The Court: If the Judge objects, all right; if not, let us find out.

Mr. Bruce: Your Honor, I do not have a copy of the record here. I don't know. I would like to know what he was called as a witness for.

Mr. Herwitz: I will withdraw my objection:

A. I think their purpose was to try and show what a strike in a loft building would do and how it would affect interstate commerce. They put me on the stand and asked me about the 1936 strike. There was an objection and I was not permitted to testify.

Q. And was that the sum total of your appearance? A. In substance, yes.

Q. And when did you fix that day of that appearance? A. I did not fix it. I know it was—it probably was at the time that we were in the course of preparing the case, this New York case, or at least we were continuing to assist the Wage and Hour Division.

Q. The Arsenal Building case brought by the Government was commenced by the service of papers in March, 1940? A. Yes.

Q. Does that aid your recollection as to when you appeared in Philadelphia before Judge Kirkpatrick? A. To the best of my recollection it was at least several months before. I think the Court there in Philadelphia held up the decision for a couple of months.

Q. You would place it, though, in the year 1940, would you not? A. I think so.

Q. In any event, whatever the records of the Federal Court in Philadelphia show as to the date of trial, that would fix the date as to when you appeared? A. No question about it.

Q. You have been counsel, have you not, for a great many labor unions for about fifteen years? A. That is right.

Q. And you have been counsel for Local 32-B how long? A. It was born, if I may use the expression, in my office.

Q. Is it fair to say that the office— A. That was, I dare say—when was it—was it 1933—

Q. 1934. A. No, 1933, when the LaGuardia-O'Brien-McKee Campaign—

Mr. Herwitz: That is correct.

Q. I think that is right. A. Then it was in November or December of 1933 that the union really got its start.

Q. And you were counsel, then, right from the birth of this union through to December 31, 1941? A. That is right.

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*Plaintiff's Witness, Edward C. Maguire, Cross*

Q. Would it be fair to say that the officers of this union relied heavily on your judgment on legal problems as well as practical labor problems because of your experience all during that period? A. Some of them did.

Q: Which ones? A. James J. Bambrick and others, up until, I dare say, around 1939, 1940. I think fairly generally they depended upon my advice, although they were never always in agreement with me.

Q. How about the rank and file of the union? A. I think that they had confidence in me.

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Q. Well, you seem to suggest about 1940 that the officers of the union did not rely so heavily on your judgment on legal problems and other problems. Was there some sort of a breach there? A. Well, there was some sort of political problems.

960

Q. Did any of those political problems have to do with the failure of this Local 32-B to take any steps to enforce the Wage and Hour Law? A. Well, the first, as far as I can recall, and to my knowledge, that there was any question of application that entered into this matter of enforcement of the Wage and Hour Act, or getting action by Col. Fleming and his division, was possibly around the time that one or two of those men brought suit, and your office defended the suit. They brought the suit in the Municipal Court.

Q. You refer to the case of Killingbeck v. The Garment Center Capitol Building? A. Yes.

Q. Well, is it your testimony that the institution of that action produced a political situation within the union with respect to the enforcement of the Wage and Hour Law? A. No, I would say this, that the two people who started the suit and a few of their friends then started to agitate politically about the situation, but it was prior to the institution of that suit, to the best of my recollection, that the officers of the union and their counsel visited Col. Fleming.



*Plaintiff's Witness, Edward C. Maguire, Cross*

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Q. Will you fix for us as closely as possible the date when you and the other officers of the union visited Col. Fleming? A. I could not do that now. I would not want to be certain. I do think that I could look up my own diaries and probably—

Q. Couldn't you refresh your recollection from this red book (indicating)? A. No, because that closed with, if you will notice, if you look at it, it closes with the award.

Q. With the McGrady award in February, 1939? A. Yes.

Q. And it is a fact, then, that you did not go to Washington to see Col. Fleming about the Wage and Hour Law and its applicability to these employees until after the McGrady agreement had been signed, sealed and delivered, isn't that so? A. Undoubtedly.

962

Q. Isn't it a fact, Judge McGuire, that the officers of the union became disturbed by the political rumpus that Killingbeck and his associates kicked up about failure of the officers to do anything about the Wage and Hour Law, and as a result of that you and officers as a middle course went to Washington to see if you could not have the Administrator bring a test case? A. I do not think that is accurate.

Q. Will you categorically state that you went to Washington to see the Administrator before there was any rumpus by Killingbeck and Riddock about the failure of the officers to enforce the Wage and Hour Law for the benefit of the members of the union? A. Repeat that question.

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Mr. Bruce: The stenographer will do that.

Q. (Question read.) A. What you are directing at me is a question as to what time?

Q. Right. A. I cannot say that unless I check my diaries.

Q. And you cannot check that from this red diary? A. No.

964.

*Plaintiff's Witness, Edward C. Maguire, Cross*

Q. When did the officers of the union with their counsel determine or come to the conclusion that the Wage and Hour Law, the Federal Wage and Hour Law, was applicable to loft building service employees in New York City? A. When the Supreme Court of the United States rendered its decision.

Q. On June 1, 1942? A. Then they knew for the first time definitely that it was applicable.

Mr. Herwitz: Will you read that again?  
(Record read.)

965

Mr. Herwitz: If your Honor please, I move to strike out the answer except insofar as it gives the state of mind of this witness. I cannot see how he can testify as to the state of mind of anybody else.

Mr. Bruce: If your Honor please, this witness has testified, and it must be obvious, that these men relied heavily on his judgment, and he is expressing not only his own opinion but the opinion of the officers, which was the way I phrased the question, and again, I think Mr. Herwitz is objecting not because the answer is not responsive but because it is too responsive.

966

The Court: I think I will let the answer stand.

Q. You weren't certain, were you, Judge Maguire, until the Supreme Court decided the question on June 1, 1942, that an elevator man was engaged in the production of goods for commerce? A. I certainly was not.

Q. And you had grave doubts about it in 1938 when the Act was passed, did you not?

Mr. Herwitz: I object, if your Honor please, to the doubts or the lack of doubts of this witness.

The Court: It seems to me, Mr. Herwitz, that the direct examination that was had opened this

*Plaintiff's Witness, Edward C. Maguire, Cross*

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up sufficiently to allow the other side to cross examine on it.

A. I did not know, frankly.

Q. Didn't you have grave doubts as a lawyer that the Act would ever be held applicable to the employment relationships in this industry? A. Well, certainly if you will forgive me for this type of answer, I will say that a Federal Judge in Philadelphia decided one way and another Federal Judge in this district decided another way, and I certainly felt that there was a doubt about the thing.

Q. But did you feel that there was a grave doubt about it? A. Yes. I think that is a fair statement—as a lawyer. 968

Q. And as a lawyer— A. I felt quite uncertain. I did not know what the ultimate result would be.

Q. And as a lawyer and as a lawyer for this union, didn't you express those doubts to the officers of this union? A. I talked of other things than that doubt.

Q. Didn't you tell these officers of this union when the Act was passed in June, 1938, when it became effective in 1938, that there was grave doubt as to the application of the Act to the Building Service Industry? A. I said there was a serious question as to it.

Q. You said that to them? A. Yes.

Q. As attorney for the union, did you ever prepare any statements with respect to the Wage and Hour Law or the collective bargaining agreements of the union for the official publication, "Building Service"? A. I may have. 969

Q. Did you ever recall of having written any particular articles with reference to the Wage and Hour Law, or having approved them? A. Yes, I think some such thing as that was done.

Q. Mr. Bambrick, you testified, relied heavily on your judgment in particular, did he not? A. That is right.

Q. I show you, Judge Maguire, a copy of Building Service magazine, Local 32-B, for October, 1939, and call your attention to the president's page, page 3, and ask

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*Plaintiff's Witness, Edward C. Maguire, Cross*

you whether you read that before it was published or approved it for publication (handing)? A. I did not.

Mr. Herwitz: What is the date of that?

Mr. Bruce: October, 1939.

Q. Well, as attorney for the union, did you regularly read statements that appeared in the magazine, Building Service? A. Usually.

Q. Do you recall having read this particular article after it appeared? A. Yes, I think so.

971

Mr. Bruce: I offer it in evidence.

Mr. Herwitz: May I see it, please?

Mr. Bruce: Yes (handing).

Mr. Herwitz: I object.

The Court: Objection overruled.

(Marked Defendants' Exhibit K.)

Mr. Bruce: Did your Honor see this?

The Court: I did not read it. Do you want me to read it now?

Mr. Bruce: No. I just saw you hand it back.

The Court: Well, I did see it. I thought it was proper to offer it.

972

Mr. Bruce: As long as you did not read it, I would just like to read it to you so that the questions will be clear. It is very short.

The Court: I will read it myself.

Mr. Bruce: Surely (handing to Court). It is just that first paragraph.

The Court: Anything more?

Mr. Bruce: No.

(The Court examined Exhibit K.)

Q. Judge Maguire, would you say that the writer of that article, whoever it may have been, at the time of writing the article, was in doubt as to the application of the Wage and Hour Act to loft building service employees?

*Plaintiff's Witness, Edward C. Maguire, Cross*

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Mr. Herwitz: I am inclined to object to that question, your Honor.

The Court: I should think your inclination was right.

Q. Did you ever express the opinion to any representative of the Penn Zone or Midtown Associations, or the Realty Advisory Board on Labor Relations, Inc., that the Federal Wage and Hour Law in your opinion did not apply to loft building service employees? A. I did not.

Q. Never? A. Never.

Q. Under any circumstances? A. I said never.

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Q. Did you express to any of those people, representatives of those associations I named, grave doubt as to the application of the Wage and Hour Law to loft building service employees?

The Court: Mr. Bruce, haven't you asked that question of the Judge several times?

Mr. Bruce: No. That was with respect to his advice to members of the union. This is now whether he ever expressed those doubts to any representatives of the owners' associations.

A. I may have said that I did not know whether the Act would be held to apply, but that is the furthest I went in any statement. 975

Q. Well, do you mean by that that you did express such remarks to the owners' associations or their representatives? A. I do not recall specifically doing it at any time.

Q. It is not improbable— A. I know that I told the representatives of the union, whenever asked, I said I did not know whether it applied or would be held to apply.

Q. But it is not improbable that you did make such an expression? A. I may have said that same thing to the union representatives in the presence of the real estate people.



976

*Plaintiff's Witness, Edward C. Maguire, Cross*

Q. And you might have made such statements in the negotiations that led up to the McGrady agreement, is that true? A. No, definitely not, because I was very alive to the position of the union membership and of the need of protecting them and in saving them whatever rights they might have under the law.

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Q. In other words, in the negotiations when the members of the union were present, you were always careful never to admit that the Act did not apply, but in conversations away from those negotiations you may have gone further, is that correct, and admitted that it was possible that it may not apply?)

Mr. Herwitz: I object to the form of the question.

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A. I will put it this way: I know Mr. Rawlins well; I knew Mr. Mayer well; I know Mr. Brown well. I have met them on the street, I have talked with them. I will not deny that I might have, although I have no recollection of ever having said it, but I might have said that I didn't know whether or not it applied, but, on the other hand, as far as the protection of the members were concerned, and in those negotiations I insisted throughout that that particular provision should go in, and when Ed McGrady put the other one in, it was over my strenuous objection.

Q. Well, you were careful in those negotiations not to make such statements because of your zeal to protect the legal rights and the legal position of the members of the union? A. That is correct.

Q. Is it not? A. Yes.

Q. And that is the reason you insisted upon that clause in the McGrady agreement? A. That is correct.

Q. All right, Judge Maguire. Then when did you, as counsel for the union, come to the conclusion that the Wage and Hour Law, the Federal Wage and Hour Law, might apply to this industry?

Mr. Herwitz: I object to that question, your Honor. It assumes a state of facts not in evidence. I

*Plaintiff's Witness, Edward C. Maguire, Cross*

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do not think it can be answered. I think the form is completely objectionable.

The Court: If Judge Maguire says he cannot answer it, I think that will dispose of it. On the other hand, I see no reason why it is an improper question.

A. I thought even when we were sitting in the negotiations that when the Act was passed, it might apply, but I did not know whether it would be held eventually to apply or not.

Q. But your judgment as to that question, as to the applicability of the Act, did it grow more conclusive as the application of the Act or less conclusive as time went on after the signing of the McGrady agreement? A. Well, I think I began to feel, especially after I had talked to the counsel for the Wage and Hour—rather, Col. Fleming himself, that there was a far better—and the Wage and Hour Division people—that there was a real prospect of the thing being held to apply. 980

Q. And that was in 1940, early in 1940, was it not? A. 1939.

Q. Well, when in 1939? Was it before— A. Well, here, we saw Fleming—if somebody can help me on the date it will clear my mind. 981

Mr. Herwitz: I can—

Mr. Bruce: Let us have the date.

Mr. Herwitz: Suppose I show him—you seem to have the union magazines. Do you have the one for November, 1939? I have an excerpt from it which I can show him, which will refresh his recollection.

Will you read this, Judge? This is an excerpt from the union magazine of November, 1939. I think it will refresh your recollection as to the time when you saw the Wage and Hour Administrator (handing).

(Witness reads paper.)

982

*Plaintiff's Witness, Edward C. Maguire, Cross*

Q. What is the date, Judge Maguire? A. November 21, 1939.

983

Q. Having refreshed your recollection, then, as to the day when you saw Col. Fleming, do you now say that your convictions or your judgment as to the applicability of the Wage and Hour Law to loft building service employees was growing stronger at that time than it was at some earlier date? A. No question of it. We consulted with not only Col. Fleming but two of his counsel, and they expressed the view—we went down there, ascertained that it did apply, and these two counsel for Col. Fleming agreed. Well, certainly the adding of those two lawyers increased my optimism in it.

Q. Well, at the time that you went down to Washington to see Col. Fleming, the members of Local 32-B were being paid overtime after 47 hours of work and not after 44, were they not? A. That is right.

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Q. Did you then come to the conclusion after those conferences that the probabilities were that the Act was applicable to loft building service employees? A. Well, your Honor, I know that a lawyer is always supposed to be a poor witness. There is one element in here that probably should be disposed of in order to explain part of that passage of the period. It can never be brought out by the questions of when my optimism went up and when it went down.

Q. Well, I am willing to have your explanation, Judge Maguire? A. Well, it was simply this: Most of my discussions were with Bambrick—

Q. Who was president of the union at the time. A. That is right. I felt from my long experience in labor unions and with whatever knowledge I had of the real estate field, that even if that law did apply—now mind you, these were in talks with Mr. Bambrick, because Bambrick was the chief officer and he used to talk to me in my office usually—that we might create a situation if we

sought to impose that thing. This was just trying to figure out a course of procedure which was most advisable for the welfare of the union. He pressed for some activity, or action to have this test of the application of the law, and I, from a union standpoint, a practical standpoint, argued against it with him, this being my opinion at the time, that they might set up in this same area a condition where there would be gross inequities, that is, one building might come under the Wage and Hour Act and the employees in that building might be required to be given the 48 hours and then other things. Next door to it there might be another building where the Wage and Hour Act did not apply due to the nature of the occupancy and the type of work, and I said—my argument was, "In the long run, which is best to do? Where is the union going to benefit most?"

986

Now, it took over the course of a couple of months of my arguing with him on that, and he never agreed with me, and finally he said, "We must go ahead and see if we cannot enforce the Act." My discussions with him were purely practical, not based on any legalistic thoughts, because the union generally felt—they were laymen, they were more optimistic. I said I did not know whether or not the law applied. Every time they asked me I said that can only be determined by testing it out in the courts, but I tried to argue against testing it out for fear that they might set up this inequitable situation where one owner would be required to live up to a certain law, and the next fellow, right next door to him, would not come within the same classification.

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Q. And you felt that was inequitable because in many cases those buildings would be operating under the same labor agreements, is that correct, with the union? A. No. It was my practical judgment, and I expressed it, that oftentimes unions would be better off without some of these laws if they have organizations to protect their

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*Plaintiff's Witness, Edward C. Maguire, Cross*

members, and the like of that, but that was only my philosophy and thought. It did not prevail. The officials insisted that we should go ahead and get the interpretation.

Q. In other words, the officials of the union insisted that you go ahead and vindicate that they thought and what they thought was the rights of these building service employees, is that correct? A. If you will forgive me for this correction, I did not even know then, but I told them, what will it profit us if we win this thing and then create a series of inequities amongst the different owners? And inequalities.

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Now, my judgment, my argument, was based on practicalities, and the discussion all along—my opinion was no, I did not know whether or not it would apply, and they said eventually, go ahead and bring about the test.

Q. Then your position is, Judge Maguire—and I think you are endeavoring in a way that I know is characteristic of you, to give us the true picture here. Your position was at that time that this test should not be brought, and the position of the officers was that "We must bring this test because we must vindicate what we believe to be the legal rights of the members of our union." Is that a fair statement? A. If you are referring to the period after the conclusion of the McGrady award—

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Q. I am. A. That is the fact, and that is why there was the delay until October or November, at least two or three or four months' delay before any real action was taken.

The Court: Mr. Bruce, I would like to ask Judge Maguire a question but if either you or Mr. Herwitz objects I won't do it.

I was interested to know how this has worked out. Judge Maguire said he thought even if the union should prevail it would be undesirable because one building would be controlled by the Fair Labor



*Plaintiff's Witness, Edward C. Maguire, Cross*

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Standards Act and the other one would not, and therefore there would be an inequity. How has it worked out?

The Witness: Well, I have but general information on that, and subject to rebuttal on the part of the partisans here—

The Court: I will have this off the record, if you wish.

Mr. Bruce: I have no objection to the question.

Mr. Herwitz: I have no objection to his answering on the record, your Honor.

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The Witness: I believe that it has worked out quite well and those inequalities that I feared might occur have not occurred generally.

The Court: How has that been avoided? Hasn't a building which comes under the Fair Labor Standards Act, in substance, to pay more money to its employees?

The Witness: Well, as a matter of fact, the nature of the business of the occupants, of the garments in the fur area, is practically the same, so that they come in under the cover of the Wage and Hour Act.

Mr. Herwitz: Off the record—

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Mr. Bruce: Does this relate to that inquiry? Because I do not like to have my cross examination interrupted. If it will shed further light on what Judge Goddard asked, I think it is perfectly proper.

Mr. Herwitz: Well, I think the Court might take judicial notice—

Mr. Bruce: Well, if you are going to argue the case, we will argue that question later.

Mr. Herwitz: I will withdraw my observations.

The Court: Gentlemen, we will take a short recess.

(Short recess.)

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*Plaintiff's Witness, Edward C. Maguire, Cross*

Q. Judge Maguire, before we recessed, Judge Goddard asked you a question, and the question, as I recall it, before Judge Goddard's question, which I asked you, was in effect your judgment as to the handling of this Wage and Hour situation, was overruled by the officers of the union and the officers determined to go ahead in some manner to vindicate their position, the position that they believed they held under the Wage and Hour Law; is that correct? A. Yes.

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Q. And you fixed the time as being sometime late in 1939, I believe, or early 1940? A. What was the date of the visit to Col. Fleming?

Q. November 21, 1939. A. Well, the time was prior to November 1st, 1939.

Q. Was it prior to the date when Defendants' Exhibit K was published (handing)?

Mr. Herwitz: Was what prior, Mr. Bruce?

A. Yes, it was.

Q. It was prior to that? A. Yes.

Mr. Herwitz: I am sorry, I may be a little behind, but what prior?

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Mr. Bruce: His discussion with officers of the union at which they determined to take some action.

A. (Continuing) You see, there was another thing that was discussed too, Mr. Bruce. Then the discussion arose as to the best method of proceeding with the test.

Q. Yes. You explained that to us.

Mr. Herwitz: No, he did not explain that.

Mr. Bruce: Well, I did not ask him any question about that, Mr. Herwitz.

Mr. Herwitz: I think—

Mr. Bruce: Just a minute. I am conducting this cross examination.

Mr. Herwitz: All right.

The Court: Go ahead, Mr. Bruce.

*Plaintiff's Witness, Edward C. Maguire, Cross*

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Q. You determined on a course of action, then, did you not, with the officers of the union, to vindicate what you believed was your position under the Wage and Hour Law? A. Yes.

Q. And that course of action was that you would prepare for the Government, and the Government would institute an injunction proceeding to restrain future violations of the Wage and Hour Law against some selected building in New York City, is that correct? A. In substance.

Q. And you selected or the Government selected the Arsenal Building, is that correct? A. That is right—no. As a matter of fact, what we did was, we checked on, I think, approximately five or six buildings and the one that seemed to have the proof along—I mean where the facts were most desirable for the presentation we picked out and recommended.

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Q. Who selected the building that was to be the defendant in that proposed action? A. Well, in the last analysis, I did.

Q. You did? A. Yes.

Q. And do you recall when you selected the Arsenal Building out of this group of five or six buildings? A. Well, would you be able to tell me when the suit—

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Q. March, 1940. A. It was selected at least two or three months before that.

Q. So that it might have been sometime in January, 1940, that you determined to bring the action against the Arsenal Building? A. Or—yes, probably.

Q. And do I understand your testimony that your office turned over its facilities and prepared the case for the Government against the Arsenal Building? A. That isn't accurate. What we did was this: We asked the union to furnish us with a half dozen—the addresses of a half dozen buildings that would—and we described more or less the type that we thought would present the best test

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*Plaintiff's Witness, Edward C. Maguire, Cross*

case. Then we sent out—I believe we did pass questionnaires in each building and had the men fill them out. Thereafter, after checking those questionnaires, it is my recollection that we brought the men into the office and took affidavits and statements from them and drew up charts. We checked up, of course, on the occupants and to the fullest extent that we could, on the nature of their business. Then when we had all that material together we sent it to the Wage and Hour Administration's office in this City with the request—

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Q. You obtained this information which you speak of largely from members of the union, did you not, who were employees in these loft buildings? A. That is right, and then we took the names off the list in the hallways, of the occupants, and we checked to the fullest extent that we could on the nature of the business, to what extent it was interstate, and the like of that.

Q. Now, would you say, Judge Maguire, that the preparation of this case, the injunction action by the Government, by your office, with the aid of the members of the union, indicated a determination on the part of the union and its members to enforce the Wage and Hour Law against loft buildings in New York City? A. Undoubtedly.

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Q. And would you say that that preparation and the institution of that suit with the cooperation of your office and the union, expressed the conviction and the belief of the union that the loft buildings in New York City were under the Act? A. Yes.

Mr. Bruce: Do you have the McGrady Award? (Same handed to counsel by Mr. Herwitz.)

Q. Now, Judge Maguire, you say that Mr. McGrady by his award, Defendants' Exhibit F, denied the union a clause which would permit it, in the event of the Federal Wage and Hour Law, being applicable to the service in—

*Plaintiff's Witness, Edward C. Maguire, Cross*

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dust, to obtain automatically the benefits of that Act; is that correct? A. No.

Q. Well, what is your position? A. I would say that whether Ed McGrady wrote that in or not—

Q. I am talking about the clause that you submitted. A. Oh. I am sorry. I will have to ask for the repeating of that question.

Q. Isn't it a fact, Judge Maguire, that the clause which appears in the opening sentence of Mr. McGrady's award is the clause that you submitted? A. No.

Q. Well, will you refresh your recollection from your book (handing)? A. No. You see, if you will keep in mind, Mr. Bruce, the brief that I submitted to Mr. McGrady, his aware—

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Q. Just compare those two clauses, Judge? A. If you will compare the points of difference that were submitted—

Q. They are right here (indicating). A. I am now referring to the copy of the remaining points of difference between the parties which could not be reconciled between the parties direct.

Q. Now my question, Judge Maguire, is whether or not your testimony is that the clause that you submitted to Mr. McGrady was not intended to give you the right, in the event that you found the Wage and Hour Law applicable to the Building service industry, to obtain for the union the automatic benefit of that Act? A. Plus the fact that there would be no reduction of the wages stated in the contract.

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Q. Right. And Mr. McGrady denied that clause? A. Mr. McGrady then wrote the clause that appears here.

Q. In Defendants' Exhibit F? A. Yes.

Q. And is it not correct, Judge Maguire, that under the clause recommended by Mr. McGrady, and subsequently written into the agreement, that in the event of any such law you had the right or the owners had the right to reopen the contract for discussion, is that correct?



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*Plaintiff's Witness, Edward C. Maguire, Cross*

Mr. Herwitz: I think the thing speaks for itself.

Mr. Bruce: Well, you asked him what the intention of this clause was and I am just bringing it out again.

Mr. Herwitz: No.

Mr. Bruce: You object to it?

Mr. Herwitz: I did not ask him what Mr. McGrady's intention was—

Mr. Bruce: Well, do you object to it?

Mr. Herwitz: Yes.

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Mr. Bruce: All right; withdrawn.

Q. Judge Maguire, did the union, Local 32-B, ever ask Mr. McGrady, during the life of the McGrady agreement which ran from February, 1939, to February, 1942, to reopen the agreement because or on the ground that the Wage Law, the Federal law, was applicable to loft building service employees? A. I have no recollection of that, although I do have a recollection of trying to get Mr. McGrady to clear up a couple of points, but I cannot say that it included that.

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Q. Well, don't you have any recollection as to whether or not the union officials or you or both of you, ever asked Mr. McGrady under this paragraph, which went into the McGrady agreement, to reopen the agreement and to give the members of the union time and a half for overtime after 44, 42 or 40 hours?

Mr. Herwitz: I would like to object to that question, your Honor, on the following grounds: That the McGrady agreement or the part of the McGrady agreement that counsel is referring to, refers only to legislation enacted in the future, and I read from the agreement:

"In the event that legislation is enacted applicable to the employees in this industry" etc.

*Plaintiff's Witness, Edward C. Maguire, Cross*

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That contingency, it does not appear, ever arose, any legislation enacted thereafter. Therefore it is irrelevant and immaterial to ask this witness whether or not he did something pursuant to a contract which did not authorize him or require him to do anything.

Mr. Bruce: Your Honor, I understood this witness to testify that in his opinion this clause, as it went into the agreement, referred to any law existing or to be enacted.

Mr. Herwitz: That is a misunderstanding that Mr. Bruce has. I think it was clearly testified by this witness that the provision that this witness suggested had in mind any existing law or any future laws, but this witness did not testify concerning his interpretation of Mr. McGrady's provision as it ultimately went into the contract.

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Mr. Bruce: Well, I will ask the witness, then, what his interpretation of that clause was—and I suppose you will object to it, won't you?

Mr. Herwitz: I will object to that on the ground that the thing speaks for itself.

Mr. Bruce: All right, then I will ask him the question anyway.

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Mr. Herwitz: I think that has already been asked and ruled upon.

Mr. Bruce: I do not believe that it has.

Mr. Herwitz: I thought that you withdrew that question.

Q. Judge Maguire, will you read the paragraph that Mr. McGrady recommended for adoption by the parties in Defendants' Exhibit F, and tell us whether or not it was your understanding that that clause was intended to be applicable to any wage and hour law existing or thereafter to be enacted? A. It did not recommend—

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*Plaintiff's Witness, Edward C. Maguire, Cross*

Mr. Herwitz: I object, your Honor, on the ground that the thing speaks for itself. I did not ask this witness on direct examination his interpretation of this contract. It is therefore improper cross. And on the further ground that it appears from a reading of it it is exactly what it means, and if Mr. Bruce is tortuously trying to obtain the concession that that paragraph does not mean the Fair Labor Standards Act, he need not go to those extremes because I concede it.

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Mr. Bruce: Then I would like a ruling on this, your Honor.

The Court: I think I will allow the question.

A. In the first place, the question says "recommended." McGrady did not recommend. He ruled as an arbitrator.

Q. All right. Then my question will be deemed to be amended to include the word "ruled." A. In the second place, it clearly states "In the event that legislation is enacted applicable to the employees in this industry," and if you are asking my opinion of that, in the light of my knowledge of what occurred at the time, I think that he intended that provision to cover any supplemental legislation or extension that might be enacted in the State.

1014

Q. Now, I am asking you, Judge Maguire, as counsel for the union, what was the interpretation that you laid on that paragraph at the time that it was handed down and written into the McGrady agreement? A. If you will give me that book, I will show you the notes of what I told the union afterwards this represented, that is, reopening as to—in the event of future legislation.

Q. This book, which is your docket, I suppose? A. Yes.

Q. On these negotiations, will refresh your recollection as to the interpretation that you laid on that paragraph (handing)? A. As a matter of fact, I do not have to have my recollection refreshed.

*Plaintiff's Witness, Edward C. Maguire, Cross*

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Q. Well, what was the interpretation that you then put on it? A. It is the interpretation that the realty group suggested and recommended to McGrady and in which McGrady overruled me. They were afraid of the extension of the thing to State law, an enactment into State law, and that is what was intended in that.

Q. Would you say then, that you as counsel for the union had a different interpretation from the officers of the union? A. No.

Mr. Herwitz: I object to that.

Q. As to the meaning of that clause?

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Mr. Herwitz: I object to that.

A. I don't know what the interpretation is."

Mr. Herwitz: Judge, can you withhold your answer? I object to that question on the ground that certainly it assumes a state of facts which are certainly not in evidence.

Mr. Bruce: Well, it is in evidence and I am about to point out the conflict.

Mr. Herwitz: I do not think you ought to argue with him.

Mr. Bruce: I merely asked the witness whether or not he had a different interpretation of that clause from the interpretation that the officers of the union had.

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The Court: Judge Maguire says he can answer that question after looking over his records, which he is doing.

A. (After examining) Here is a summary that I prepared for all the proceedings we had, which is headed: "Points gained this year under proposed contract," and it reads this way—if you want me to read it.

Q. Will you refresh your recollection and then answer my question, Judge Maguire? A. I advised the union that



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*Plaintiff's Witness, Edward C. Maguire, Cross*

they had gained through this provision that you are talking of, recognition of the right to have hour reduction by future legislation, and despite the contract provision considered by McGrady in his award.

Q. May I see where you are reading from? A. Surely (indicating). "By future legislation."

Q. And that was the advice that you gave to the officers of the union as to the interpretation of that clause? A. That is what it represented, in my opinion.

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Q. Were you ever called upon to prepare for the union a summary of what it had gained by the McGrady agreement? A. That is what I referred to.

Q. That is what you referred to? A. Yes.

Q. And did you prepare such a summary for the official publication of Building Service? A. I don't know how they used it.

Q. Now will you examine Defendants' Exhibit G, and I refer specifically to page 12 and subsequent pages, entitled "Arbitrator McGrady makes supplementary award," and ask you whether you prepared that summary for publication— A. I did not.

Q. In the Building Service Magazine (handing)? A. I did not.

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Q. Well, was it submitted to you for approval before it was published? A. It was not.

Q. Ordinarily, when the officers of the union explained the gains made by a union contract and by new clauses in the union contracts with the building owners, did they submit those articles and summaries to you for approval— A. No.

Q. —as their counsel? A. No. They had a man that operated the magazine for them.

Q. Did you read that article after it was published? A. I may have, I don't recall specifically. (After examining): I don't recall, but I won't deny that I did not.

Q. You may have read it? A. I may have.



*Plaintiff's Witness, Edward C. Maguire, Cross*

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Q. Now I call your attention to paragraph 12, entitled, "Wage and Hour Legislation" in that article, and ask you whether you recall specifically reading that particular portion (indicating)? A. I do not recall reading that.

Q. But you may have read it? A. I may well have read it.

Mr. Bruce: Just to refresh your Honor's recollection I would like to read this short paragraph from Defendants' Exhibit G.

Mr. Herwitz: I object. Judge Goddard is not on the stand. I do not see why we have to read it to refresh his recollection. 1022

Mr. Bruce: Well, I learned that technique from you, Mr. Herwitz, during the course of the trial.

"As a protection for the union in the event of any wage and hour legislation, the union is permitted, according to the terms of the contract, to present the entire question to Mr. McGrady if and when such wage and hour legislation ever applies to the Building Service industry."

Q. Did you ever advise the officers of the union or the publishers of Building Service that paragraph 12 was an erroneous explanation of the terms or that particular term of the McGrady agreement? A. I did not. 1023

Q. Now I ask you again, Judge Maguire, did the officers of the union or this union, Local 32-B, ever ask Mr. McGrady during the course of the McGrady agreement, between February, 1939, and February, 1942, to reopen the McGrady agreement to give the members of Local 32-B the benefits they claimed they were entitled to under the Wage and Hour Law? A. To my knowledge—to the extent of my knowledge, no.

Q. Judge Maguire, in August, 1940, you recall that there was an arbitration of the McGrady agreement before Sidney A. Wolff, an attorney? A. Yes.

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*Plaintiff's Witness, Edward C. Maguire, Cross*

Q. Do you recall that that arbitration related to wages?

A. Yes. Wasn't there a board on that, Mr. Bruce?

Q. Well, the agreement refers— A. Yes, but wasn't there a board on that? I think either Mr. Mayer or Mr. Brown sat as a member of the board, and the union had a member of the board. Mr. Wolff was the impartial chairman.

Q. And that was in August, 1940? A. I should judge so.

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Q. At that time the suit which had been brought by the Government in cooperation with your office and the union, had been pending for about five or six months, had it not? A. I don't remember the dates.

Q. In that arbitration before Mr. Wolff, you presented the case for the union, did you not? A. I was present at several of the hearings.

Q. But didn't you outline to Mr. Wolff at that hearing what it was that the union demanded in the way of wage revision under the McGrady agreement? A. Undoubtedly I did.

Q. That was ordinarily your function as counsel, to present the union's case in those arbitrations, was it not? A. That is right.

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Q. And you were asking for revision of the contract for the period from August 4, 1940, to its end on February 3, 1942, under paragraph 16 of Plaintiff's Exhibit 3, were you not (handing)? A. Yes.

Q. Did you, as counsel for the union or the officers of the union in that arbitration, demand that the arbitrator, Wolff, or the Wage Board sitting with him, grant the union time and a half for hours after 40 hours in accordance with the Federal Wage and Hour Law?

Mr. Herwitz: I object to that, your Honor, on the ground that that was definitely not within the scope of that arbitration. It was limited by the agreement that was made in February, 1939. It

*Plaintiff's Witness, Edward C. Maguire, Cross*

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is a question put, calculated to give the wrong impression; I give it no stronger language than that.

Mr. Bruce: I think that is a very fair question.

A. The best I can do on that, Mr. Bruce, is that I don't think we did, but if you want me to be sure, if I could have the bound proceedings of that particular arbitration then I can tell you definitely.

Q. Yes. I can show you the minutes in which you outlined your case, Judge Maguire. A. Or—

Mr. Herwitz: I don't have those here, Judge.

Mr. Bruce: Off the record.

(Discussion off the record.)

Mr. Herwitz: I suggest that all this be on the record. I do not see the necessity of having it off the record.

Mr. Bruce: All right. I do not object to it.

Q. These are the minutes (handing)? A. Yes. One of the demands that were made, that I outlined to Mr. Wolff, was the matter of extending the vacation provision in the contract.

Q. Well, my question, Judge Maguire—and you wanted to refresh your recollection on it—was, did you, as counsel for the union, or did the officers of the union on behalf of the members of the union, before Mr. Wolff in August, 1940, press for the time and a half overtime after 40 hours which they then claimed to be their right under the Federal Wage and Hour Law. A. I do not think—

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Mr. Herwitz: If your Honor please—now wait a minute. This question, I would like to make a very strenuous objection to. I think Mr. Bruce, before he goes in to this, ought to call your Honor's attention to the fact that this arbitration was conducted and refers only to a wage revision. Now Section 2 of the McGrady agreement sets forth the

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*Plaintiff's Witness, Edward C. Maguire, Cross*

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wages provided for in that agreement, and the arbitration could only be as to a wage revision under Section 2. There is nothing in Section 2 of the McGrady agreement which refers to the payment of time and half over 40 or 46 or 47 hours. It was specifically limited—this arbitration was specifically limited to the wage provision, and the hourly provision had already been agreed upon in 1939, to wit, that hours would be reduced from 47 to 46 without arbitration at the end of 18 months. Now his continuing to ask this question sounds as though they could have done it, or attempts to put some significance upon their failure to do it when obviously it was not within the contract provision for them to be allowed to do it, and I must reluctantly press my objection.

Mr. Bruce: I press equally for an answer, and I think Mr. Herwitz's statement is the best argument I could possibly make to show the relevance of the matter; also the strength of his objection.

The Court: I think the question should be allowed. I think his answer will clear it up pretty well.

1032

A. To the best of my recollection there was no such demand made before Mr. Wolff.

The Court: Now, Mr. Bruce, how long will you be with Judge Maguire?

Mr. Bruce: I am almost through, your Honor.

The Court: How about you, Mr. Herwitz?

Mr. Herwitz: I can think of no re-direct.

Mr. Bruce: I think I can finish in four or five questions. I will try to.

The Court: I suppose you would like to get away, would you not, Judge?

The Witness: Yes, I would, sir.



The Court: And not have to come back?

The Witness: Yes, sir.

The Court: Well, supposing we try to accommodate the Judge.

Mr. Bruce: Yes.

The Court: It is one o'clock now.

Q. Judge Maguire, you heard Mr. Herwitz's objection to my question, did you not? A. Yes.

Q. Was that the reason that you did not demand time and a half overtime before Mr. Wolff, as stated by Mr. Herwitz? A. Well, I think that what we were trying to do was go in accordance with the particular provision, as was pointed out— 1034

Q. In other words, the union considered it to be binding as to hours but not as to wages; isn't that correct? A. No, because they had already gone down to the—they felt this way, and here is the way I expressed it to them, that the Government in this suit already instituted could impose a revision in the courts, and as far as the contract was concerned, what could be arbitrated at that time, it was specified in the particular provision of the agreement.

Q. Judge Maguire, as a lawyer do you consider payments of time, and a half for hours worked after 40, wages? A. Yes. 1035

Q. Were you counsel for the union up to December, 1941? A. Yes.

Q. Up to December 31, 1941? A. Yes.

Q. By that time, Judge Maguire, at least one District Court, Judge Kirkpatrick in Philadelphia, had decided that the Wage and Hour Law was applicable to loft buildings, had he not? A. That is right.

Q. And Judge Woolsey had held to the contrary. A. What dates were those decisions, Mr. Bruce?

Q. Judge Woolsey's decision came down in April, I believe, 1941, and Judge Kirkpatrick's came down a few days earlier—



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*Plaintiff's Witness, Edward C. Maguire, Cross*

Mr. Bruce: Is that correct?

Mr. Goldwater: Came down during the course of the Arsenal trial.

Mr. Bruce: Came down during the course of the Arsenal trial. But am I correct that it was April, 1941?

Mr. Herwitz: That is right.

Q. Did you prepare the demands that Local 32-B served on the Penn Zone and Midtown Associations at the conclusion or near the conclusion of the McGrady agreement, looking toward the reopening of that agreement? A. I did not.

Q. You did not? A. I did not.

Q. Was that because you were not then counsel for the union, or not active? A. I was counsel up until December 31st. I know they had a wage scale—I don't mean to be longwinded about it, Mr. Bruce, but I know they had a wage scale committee meeting in late 1941, and Mr. Berg of my office handled, or rather sat in at some of those wage scale meetings, but whether or not the demands were formulated in December, 1941, or in January, 1942, I can't recall. Whoever prepared them—I think it was Berg—would know that.

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Q. I show you Defendants' Exhibit J, and ask you whether that refreshes your recollection as to whether you saw the demands that the union submitted in December, 1941, to the Penn Zone and Midtown Associations (handing)? A. If you will tell me when the Penn Zone and Midtown received it—

Q. About December—well, they are dated December 2, 1941, and I assume that we received it within a few days or weeks after that, but certainly in December, 1941. A. Well, then it was prepared by Mr. Berg then of my office.

Q. Of your office? A. Yes.

*Plaintiff's Witness, Edward C. Maguire, Re-direct*

1039

Q. And did you approve them before Mr. Berg sent them back to the union for delivery to the owners? A. Well, I undoubtedly read them.

Q. At that time, Judge Maguire, your conviction was stronger, was it not, than it had been back in March, 1940, when the Arsenal Building suit was started, that the employment relationships in this loft building industry were under the Fair Labor Standards Act, were they not? A. Yes, yes.

Q. Did you in those demands make any demand for payment of time and a half after forty hours under the Federal Wage and Hour Law, or did you recommend to the union that they do so?

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Mr. Herwitz: I think—

A. You can tell me whether it is in there.

Mr. Herwitz: Wait a second. Are those demands in evidence?

Mr. Bruce: Yes, they are.

Mr. Herwitz: I think they speak for themselves, your Honor.

Mr. Bruce: All right. No further questions.

*Re-direct Examination by Mr. Herwitz:*

1041

Q. Judge, as far as I understand, you have no recollection of having actually seen these demands, Defendants' Exhibit J? A. If Mr. Berg prepared them, I undoubtedly looked them over.

Q. But you have no independent recollection, have you? A. No.

Mr. Herwitz: That is all.

(Recess until 2:05 P. M.)

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*Defendants' Witness, William D. Rawlins, Cross*

## AFTERNOON SESSION.

WILLIAM D. RAWLINS, resumed the stand.

*Cross Examination by Mr. Herwitz:*

Q. Mr. Rawlins, you represent a large group of real estate owners in the City of New York, do you not? A. Why, I am secretary of the Realty Advisory Board.

Q. I am sorry. When I said you, I mean the association of which you are the secretary? A. That is right.

1043

Q. You have their interests very much at heart, do you not, Mr. Rawlins? A. I have.

Q. The purpose of the Realty Advisory Board is to advance and take care of the interests of the real estate owners, is that correct? A. To protect them.

Q. That is one of the purposes, at least? A. Yes.

Q. You testified here, did you not, that Mr. Maguire, in the course of these negotiations, had stated that in his opinion the Federal Fair Labor Standards Act did not apply to the employees involved in the dispute which culminated in the McGrady agreement. Is that what you testify to? A. I think that I said that either he or Mr. Bambrick said so at that conference.

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Q. Then do I understand that you do not testify that you definitely recall that Mr. Maguire said that? A. Everybody at the table passed over the Federal Act. There was very little discussion on it. I have a vague recollection that when I first mentioned the Wage and Hour Act that they joked with me about it and they said, "Well, Bill, you do not mean that you are going to put an elevator man into interstate commerce."

Now, as I testified, the thing that concerned me was the effect that the State Act might have, and there was very little discussion as to the Federal Act. It was accepted, it was the consensus of those present that the Federal Act did not apply. We weren't disturbed that much.

*Defendants' Witness, William D. Rawlins, Cross* 1045

Q. Now, may I have my question read. I want to find out whether or not the answer was responsive.

(Question read.)

Mr. Herwitz: I move to strike out the answer as not responsive.

The Court: I think a good part of it was not responsive, so I will let it go out.

Mr. Herwitz: Yes.

The Court: Parts of it, though, probably are.

Mr. Herwitz: Quite right, your Honor.

Q. May I inquire, Mr. Rawlins—and please answer only the question that I put to you—do you definitely recall that Mr. Edward C. Maguire, the previous witness, in the course of these negotiations leading up to the McGrady agreement, stated in words or substance that the Federal Fair Labor Standards Act did or did not apply to the employees involved in that dispute. Do you definitely recall that, yes or no? A. I would say that he definitely did not think it applied. Now whether he took upon himself to say that it just did not positively, I do not recall except, as I told you, that the Federal Act was not discussed at any length. It was just accepted by everybody present as not being of any concern to us in our negotiations. 1046

Mr. Herwitz: Now I ask to strike out so much of that answer which was not responsive to the question that was put.

The Court: Well, the latter sentence I think was not responsive.

Mr. Herwitz: That is correct.

Q. Now, did Mr. Maguire say, in substance, that in his opinion the Fair Labor Standards Act did not apply? Did he say that? A. My recollection is that he did. 1047

1048

*Defendants' Witness, William D. Rawlins, Cross*

Q. Now, is that a specific recollection that he said that? A. That he and Bambrick and everybody at the table.

Q. I am not asking you about Bambrick and everybody at the table.

Mr. Herwitz: I move to strike that part of it out.

A. I am trying to give you the truth of what happened.

The Court: Yes, I think so.

1049

Q. Well, I do not deny that you are trying to give us the truth. I am just asking you to answer the specific question that I put to you. Are you testifying that Mr. Maguire said that in his opinion the Fair Labor Standards Act did not apply, yes or no? A. I think I am honest when I say yes.

Mr. Herwitz: I move to strike out the witness's characterization of his own testimony, and I ask him to merely answer the question.

The Court: I think that is an answer. Isn't that an answer to the question. It is rather qualifying.

Mr. Herwitz: All right.

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Q. You say you think you are honest when you say yes? A. Yes.

Q. May I, from that answer, come to the conclusion that you want this Court to believe, and you mean us to believe, that Mr. Maguire did say that in his opinion the Fair Labor Standards Act did not apply to the employees involved in this dispute? A. Yes.

Q. And is it your testimony that you definitely recall Mr. Maguire saying just that? A. No, it isn't that at all. I have tried to tell you the circumstances and my impression and recollection of it, and that certainly—and that furthermore it is fortified by conversations that I had with him afterwards.



*Defendants' Witness, William D. Rawlins, Cross*

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Mr. Herwitz: I move to strike that out, your Honor, on the ground that it is not responsive.

The Court: Yes.

Q. You have, according to the way I have heard it, answered my question yes and no. Is that a correct interpretation of it, Mr. Rawlins? A. No, I did not mean it to be yes and no. I meant it to be yes.

Q. Did you or did you not, in response to a question I just put to you, say that you did not want me to understand that you definitely recall that Mr. Maguire had said that the Fair Labor Standards Act did not apply to the building service employees involved in the dispute? A. I don't think I said anything like that. 1052

Q. Now, if I misunderstood you, let us clear it up.

Mr. Herwitz: May the stenographer find that answer to that question and read it for me?

(Record read.)

Q. Now, Mr. Rawlins, correct me if I am wrong, or if you misunderstood me, all right, but you just answered no to the question I put to you, did you not, the question which the stenographer just read? A. I said I did not testify as you said I did.

Q. You did not testify what? What do you understand that? A. That he did not say no. 1053

Mr. Bruce: Your Honor, I do object to this badgering of questions.

The Court: I do not think it is badgering the witness but I think what you both are trying to do, undoubtedly, is to get the thing straightened out, and I think this method is liable to complicate it even more, not clear it up.

Mr. Bruce: That is the feeling that I get, too.

Q. Then I put this question to you—

The Court: I think you can make your question a little bit clearer and simpler.

1054

*Defendants' Witness, William D. Rawlins, Cross*

Q. Mr. Rawlins. December, 1938, is more than four years ago, is that correct? A. That is correct.

Q. Now, in those four years many things have happened, isn't that so? A. That is true.

Q. I am trying to ascertain the vividness of your recollection of conferences that took place and things that were said by the parties to those conferences in December, 1938, and in January and February, 1939. You understand that? A. (Witness nods head.)

1055

Q. When you nod your head, the record does not get it. A. I do, yes.

Q. I want to know once and for all as to Mr. Maguire—and I am only asking you about him—as you sit there on that stand this minute, do you recall that Mr. Maguire said in words or substance at these conferences that we have been discussing and referring to, that the Federal Fair Labor Standards Act did not apply to the employees involved in that dispute, yes or no? A. It is my recollection that he did.

Q. It is your present recollection that he said that?

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Mr. Bruce: Your Honor, the cross examiner said once and for all. He got his answer when he asked the question, and as I understand it, that is for all. You got the answer.

The Court: I think this cross examination is proper. It isn't altogether free from my concept of what the situation is. I think the cross examination is proper.

Mr. Herwitz: Thank you.

Q. Now, do you recall that Mr. Bambrick made such a statement? A. It is my recollection that everyone at the table did, including Mr. Bambrick.

Q. That everybody said that, is that right? A. Well, when I say everybody, those who were speaking for the union and those who were speaking for the employers.

*Defendants' Witness, William D. Rawlins, Cross*

1057

Q. Did Mr. Sullivan say that? A. No, I don't think he did.

Q. Did he disagree? A. No, he kept quiet.

Q. Did anybody in addition to Mr. Bambrick and Mr. Maguire make the statement that you say was made, to the effect that the Fair Labor Standards Act did not apply to the employees involved in the dispute? A. My recollection is that at one of the hearings Mr. Berg did.

Q. Mr. Berg of Mr. Maguire's office? A. Mr. Berg of Mr. Maguire's office.

Q. Did anybody else? A. Well, I do not recall because it was, as I told you in the beginning, the discussion of the Federal Act was very limited. It was passed over and it seemed to be the consensus of everybody that it just did not apply.

1058

Q. When was the first time, Mr. Rawlins, that you told anybody that you recall that Mr. Maguire at these conferences had made the statements to the effect that the Fair Labor Standards Act did not apply to the building service workers involved in that dispute? A. Well, I can't tell you the date but it would go away back to the time of the Riddock suit having been brought, or the Killingback case that you speak of.

Q. Well, I haven't spoken of it? A. Well, it has been referred to.

1059

The Court: It is the Kirschbaum case, isn't it?

The Witness: No, the Killingback case, that is the one in the State Court.

Mr. Bruce: Your Honor, that is the case which was brought in the Appellate Division of the Supreme Court of New York in the spring of 1940, where Judge Untermyer and the Appellate Division held there was no coverage. It was entitled Killingback v. Garment Center Capitol Building. It was referred to in Judge Maguire's testimony this morning.

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*Defendants' Witness, William D. Rawlins, Cross*

Q. And to whom did you make this disclosure? A. Well, when it was discussed in the office.

Q. In your own office? A. Yes.

Q. Apropos of what did you make the statement? A. Apropos of the suit having been brought against the Garment Center Capitol.

Q. And did you ever discuss with Mr. Bambrick the fact that such a statement, to the effect that the building service workers involved in that dispute were not covered by the Fair Labor Standards Act had been made?

A. Oh, I discussed it with him, yes.

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Q. When did you first discuss it with Mr. Bambrick? A. Well, I can't tell you the exact date, but it was probably around the same time that the Killingback case was first started.

Q. Was that before or after the Government commenced its suit in the Arsenal Building case? A. My recollection is that it was quite a bit before.

Q. The Killingback case? A. Yes.

Q. Was quite a bit before the commencement of the suit in the Arsenal case? A. That is right.

1062

Q. And where did you have this discussion with Mr. Bambrick? A. Well, I do not remember exactly where it was but it was at some of our various meetings, possibly at John Sloan's, before an arbitration, or here, there and the other place where it might have been.

Q. You met him very frequently? A. Quite often.

Q. Did you accuse Mr. Bambrick of double-crossing the realty group? A. No, sir, I did not.

Q. Well, didn't you consider it a double-cross when the union co-operated with the Government in bringing the Arsenal Building case? A. No, sir, I did not.

Q. Well, didn't you consider it was entirely inconsistent with these statements that you say were made by the union? A. No—if you want to know what I think about it?

*Defendants' Witness, William D. Rawlins, Cross*

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Q. Sure, I do. A. Well, I just figured that somebody had brought up this question and there was a possibility that it might apply, and the union said, "Sure, we will go after it. If we can get it, all right. If we can't, OK."

Q. Didn't you consider that a double-cross on the union's part when they had made that representation to you at these conferences? A. I just told you that I didn't.

Q. Even on what you say, Mr. Rawlins, it would seem to me that there would be a violation of good faith? A. Well, I did not think of it in that light. I figured the union was out to get what it could for its members and it was taking every means that it could to get it.

1064

Q. Well, do I understand that you still do not think there has been a violation of good faith on the part of the union? A. Not of good faith in that sense.

Q. Do you think it is always good faith if you are out to get what you can? A. That was the union's standpoint, the usual union tactics.

Mr. Herwitz: I move to strike that out, although I think I asked for it, your Honor, so I will ask that it remain.

Mr. Bruce: Make up your mind.

Mr. Herwitz: That is directed to the Court.

1065

Q. Mr. Rawlins, in your representation of the realty group would you say that it is the realty group's desire to prevent the union from getting what it wants? A. Well, it depends upon what they are asking for. We have gone a long way to see that the union got things.

Q. You have? A. Yes, sir.

Q. Now, in 1939 the union asked for much too much, did it not? A. Yes, it did, and the whole discussion, if you will read your record, at that particular time, over the question of wages and hours was due to the inability to pay.



1066

*Defendants' Witness, William D. Rawlins, Cross*

Q. Yes. A. Your industry was in distress at that particular time, and if you may recall, at that particular time, from the very beginning, the Realty Advisory Board and the employer's representatives suggested that the matter of wages and hours be arbitrated.

1067

Q. No matter what the reason was, Mr. Rawlins, there is no question in your mind that the realty group in 1939, in negotiations culminating in the McGrady agreement, absolutely refused to make any offer of any wage increases, or hourly reductions, prior to the time the matter came before the Mayor, and the buildings were on strike? Now isn't that so? A. As I recall it, that is so. We suggested we have it arbitrated because we were so far apart.

Q. Yes, and this argument of inability to pay is always put up by the real estate group, is it not? A. No.

Q. Well, when was the first time it was not? A. Well, I think in the Meyer agreement there was no question about inability to pay.

Q. In 1942, is that right? A. Yes.

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Q. And as a matter of fact, right now, in an arbitration that is pending, there has been no claim by the buildings involved in this Meyer agreement of inability to pay any wage increases found by the arbitrator?

Mr. Bruce: Your Honor, I object. This is going a little bit far afield. I mean it is not an issue in this case, at least so far as Mr. Rawlins is concerned, because he has not been shown to be connected with the Arsenal Building Corporation, whether or not they could pay these overtime wages in this suit or not, if they were required to. I frankly do not see the relevancy of this line of inquiry.

The Court: I do not know what the proof is as to the inability to pay, if there is any such testimony. Of course I do understand that the defense

*Defendants' Witness, William D. Rawlins, Cross*

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contends that the contracts were made on the basis of certain labor charges and if those labor charges are now, this day, changed, it would seriously affect them financially.

Mr. Bruce: That is correct, your Honor, and this witness is not an officer of this defendant. As he stated, he is a director of realty associations generally in New York City. He is not a competent witness as far as this particular defendant is concerned as to its fiscal or financial ability.

The Court: I think you are probably right about that.

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Mr. Herwitz: Then I move, your Honor, to strike so much of the witness's answer to the question which dealt with the ability or inability of real estate or these buildings to pay, which was an answer which he gave several questions back. If that goes out, I shan't press this.

The Court: That answer was developed to one of your questions.

Mr. Herwitz: If your Honor please, if you examine the question you will find it was not responsive but I hesitated in the light of what might have seemed to be a technical way I had of moving to strike out every answer that was not responsive, to make a motion with regard to all of these answers, and I have no doubt that had I moved in connection with that my friend here would have jumped up and said it was perfectly relevant.

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The Court: Well, if it is we can take the questions and answers and go through them.

Mr. Bruce: I think the objection is too little and too late. If Mr. Herwitz had considered it objectionable, he would have objected when he got the answer. This is different, and it is pointed at this lawsuit.

The Court: I think so.

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*Defendants' Witness, William D. Rawlins, Cross.*

1073

Mr. Herwitz: I urge it, your Honor, on an entirely different ground, and that ground is this, that there has been a terrific amount of evidence put into this case concerning which I have vainly contended it has no connection and no relation and is not binding upon the plaintiff Meyer Greenberg, despite which objection the testimony has gone in. I have always understood that it was the nature of the defendants' claim that we had to consider the negotiations between the association and the union as our yardstick rather than between the employer and the employee, the plaintiff and the defendant. Now while I certainly object to the reasoning of my friend in that connection, I do not see why it should not work for me as well as for him. Now either they are relying upon the negotiations between the association and the union as indicating a contract of employment or something of that nature, or they are not. If they are not, they should so state and they should take their position one way or the other. If they are to change their theory at this point I should know it, I should be informed. If the whole idea of their defense is to build up the relationship and the contract entered into between the association and the union, I should be allowed to inquire into the testimony of this witness who was present at these negotiations, concerning the manner in which this contract was entered into.

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The Court: You talked about several things there. On this precise question you really haven't said very much. The answers made by this witness originally were answers to your questions. They were complete answers. Now, as I understand your question, it is whether or not this Arsenal Building was in a position to pay.

*Defendants' Witness, William D. Rawlins, Cross*

1075

Mr. Herwitz: No, your Honor. I asked this witness, if I may recall it, whether or not he had ever been in favor or whether or not he or his association, did not oppose the demands of the union, and whether it was not their purpose and function—

The Court: That is quite true, but that is really aside from the question we are talking about. I take it that your objection is, or your point is to show the ability or inability, whichever it may be, of the Arsenal Building Corporation, to meet any payment which it may be required to make for past wages. That is what I get out of your questions.

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Mr. Herwitz: I haven't directed it concerning the Arsenal Building, but I will take an exception—

Mr. Bruce: That is the innuendo and that is the vice of the question. It could not have any relevancy unless that were the purpose.

Mr. Herwitz: May I take my exception to your Honor's ruling and go forward?

The Court: Yes. It does not appear that he knows what the financial condition of the Arsenal Building is.

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Mr. Herwitz: No, of course not, your Honor.

Q. Mr. Rawlins, in 1938, when the owners sat down with the union, the standard number of hours of the employees involved, in accordance with the Extended Mahoney Agreement, was 48 hours per week, is that correct? A. That is correct.

Q. As of that date you know now, and I presume you knew then, that under the Fair Labor Standards Act the standards as of that time was 44 hours per week, is that correct? A. I think I knew that, yes, because I read the Act when it was passed.

1078

*Defendants' Witness, William D. Rawlins, Cross*

Q. You are then familiar generally with the Act, are you not? A. In a general way.

Q. Are you familiar with Section 18 of the Act? A. Not by Section 18. What is it about?

Mr. Bruce: Your Honor, I do not know what the purpose of this question is. Mr. Rawlins is not a lawyer. Anyway, the Supreme Court in *Walling v. Belo*, has held that Section 18 is meaningless, so why ask him about it.

1079

The Court: I think Mr. Herwitz has a right to ask that question. Of course I do not know what he is leading to, but it strikes me as material.

Mr. Herwitz: Of course I wish to note on the record what should be obvious, that Mr. Bruce, in accordance with his usual practice, has telegraphed to the witness what he thinks the witness ought to have in mind when he answers the next question, the purpose of which even Mr. Bruce does not know.

Mr. Bruce: I take an exception to that, your Honor, that I am in the telegraph business.

Mr. Herwitz: And interstate commerce.

1080

The Court: Do you have a copy of the Act?

Mr. Herwitz: I have, your Honor.

The Court: I have a copy of it here.

Q. Now, are you familiar with Section 18 of the Act? A. Not as merely Section 18.

Q. All right, will you read it (handing)? A. Well, I have read it.

Q. And had you read it prior to these negotiations in 1938? A. Well, I really don't know whether I had or not, but I presume that I had. It did not make an impression if I did.

Q. I am not concerned about the impression that reading has on you, Mr. Rawlins.



*Defendants' Witness, William D. Rawlins, Cross*

1081

Mr. Herwitz: So I move to strike out that answer.

The Court: Strike it out.

Q. Mr. Rawlins, do you know from your experience as a representative of real estate in labor negotiations whether or not a reduction of the hours of employment in a loft building for the building service crew of that loft building from 48 hours per week maximum number of hours at straight time, to 44 hours per week maximum number of hours at straight time, will, in the ordinary course of events, increase labor costs in that building?

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Mr. Bruce: Your Honor, again I object to what Mr. Rawlins' knowledge is as a labor relations man on the question of cost of the Wage and Hour Law, because the only question here is not what it costs any building other than the Arsenal Building Corporation, which was the owner of the building, and Mr. Rawlins has not been qualified as a witness with respect to labor costs in that building.

Mr. Herwitz: I shall connect this, your Honor.

Mr. Bruce: I doubt it.

The Court: Mr. Herwitz, I will have to have the question read. I was reading the statute.

1083

(Question read.)

The Court: That question is proper. He asks if he knows.

Mr. Herwitz: Yes.

A. Well, I don't know except by hearsay. I have never run a building.

Q. Mr. Rawlins, is it part of your job as secretary of the Realty Advisory Board to virtually be an expert for purposes of labor negotiations with all aspects of the running of a building? A. No, sir, I am not an expert in anything.

1084

*Defendants' Witness, William D. Rawlins, Cross*

Q. Have you ever said, Mr. Rawlins, that the reduction of maximum number of hours at straight time is calculated and will result in an increase in the labor costs in a building?

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Mr. Bruce: Your Honor, I object to this line of questioning. It has no relevance in this case what Mr. Rawlins, as a student of labor relations in this industry thinks as to the cost of the Wage and Hour Law. This is a suit involving the Arsenal Building and the Arsenal Building Corporation, and there is an innuendo in that question, as there was in the other one.

Mr. Herwitz: I object to that.

Mr. Bruce: He wants to relate the general testimony of this witness to a particular situation.

Mr. Herwitz: If your Honor please, it is absolutely useless for me in a cross examination designed to elicit the truth when truth is a definite issue in this case—

Mr. Bruce: Well, ask Mr. Rawlins whether there is a war on. Supposing I objected. It is true that there is, but what relevance does it have?

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Mr. Herwitz: If your Honor please—

Mr. Bruce: Are you making a general inquiry of the truth? If you are, why waste the time of the Court or mine in that. You have had your opportunity with Mr. Spear on this question.

Mr. Herwitz: If your Honor please, I must confess that the interruptions I have been forced to suffer from Mr. Bruce are not calculated to enable me to help the Court in ascertaining whether the witness is telling the truth on what is apparently an important issue in this case. The issue in this case as presented by this witness's testimony is whether or not he is lying, to use the bald statement, or whether or not he is telling the truth.

*Defendants' Witness, William D. Rawlins, Cross*

1087

Now there is a sharp difference in the unequivocal statement of my witness, Mr. Maguire, and the testimony of this witness, and much as I hate to inject into any trial anything as ungentlemanly as the telling of a falsehood, I think that somebody is deliberately, or maybe inadvertently, falsifying, and I should be allowed full and complete latitude to determine whether the falsehood is on my side of the fence or on theirs.

The Court: I like to be perfectly frank about this. I thought that Judge Maguire, and I think Mr. Rawlins, are giving their best recollections.

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Mr. Herwitz: As I said, your Honor, it depends—

The Court: But that is really beside the point. Perhaps it is entirely beside the point because you want to question the witness and you can go ahead and question the witness.

Mr. Bruce: Well, does your Honor allow that question on a question of credibility as to whether this witness, who testified nothing at all about labor costs in the Arsenal Building, should express an opinion one way or the other as to whether or not the operation of the Act would or would not increase labor costs?

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The Court: I do not see that it has any bearing but I do not see any harm in allowing the question.

Mr. Bruce: Exception.

The Court: I think it is a needless question myself. You may answer. You asked him whether he could express an opinion.

Mr. Herwitz: Yes.

A. Would you mind having it read? I really do not recall it.

Q. Let me reframe it. Have you ever said that a reduction in hours increased labor costs in a building?

A. I probably have, yes, sir.

1090

*Defendants' Witness, William D. Rawlins, Cross*

The Court: Why do you object to that, Mr. Bruce? I cannot see, as the Judge sitting in this case, why. That is quite obvious, I should think, isn't it?

Mr. Bruce: That is exactly why I object to it, your Honor. This witness did not testify anything as to—

The Court: I think so often when a question which is immaterial is asked, it takes a great deal more time to discuss it and object to it, because when it goes in it doesn't make any difference. Suppose your witness said he went out horseback riding yesterday. It has nothing whatever to do with the case.

Mr. Bruce: That is true.

The Court: To discuss whether it is material takes time.

Mr. Bruce: That is true, your Honor.

The Court: And here is a strong probability that a man in the real estate business would give more thought to this Act and think, "Well, this will probably be decreasing the hours and increasing the cost of operation of a building." That is natural.

Mr. Bruce: The vice of the question about the horseback, your Honor, is that the next question is, "Did it snow yesterday or did it not?" And Mr. Herwitz will show this man is a liar because it snowed when it didn't. All the questions are irrelevant. It is exactly what he is doing. The horseback analogy is a good one.

The Court: I think you will have to rely on it not being carried too far. Let us go ahead with it now.

Mr. Herwitz: If your Honor please—

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*Defendants' Witness, William D. Rawlins, Cross*

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The Court: Do you know what the question is? Is there any unanswered question?

The Witness: I don't think so.

The Court: What is the next question?

Mr. Herwitz: What is the last question and answer?

(Record read.)

Q. How much have you said that a reduction of four hours from 48 to 44 would increase labor costs? A. I don't know that I ever said that it would increase costs in any particular amount. That could be figured out.

1094

Mr. Bruce: Is it understood that I have an objection to all this line?

The Court: Yes.

Q. Would you want to make a statement concerning that right now? A. I have no desire to.

Q. Have you any opinion on that subject right now?

Mr. Bruce: Your Honor, I object to this.

The Court: Yes. I think this is going too far.

Mr. Herwitz: Your Honor, I hate to admit defeat, but I submit I have had no opportunity to show how this is connected. I see no point in my further pursuing it because of the character of the objection interposed.

1095

Q. Did you, Mr. Rawlins, discuss with your committee, outside of the hearing of the union officials, the effect of the possible application of the Wage and Hour Law on the labor costs? A. Well, what law do you mean?

Q. The Federal Fair Labor Standards Act.

Mr. Bruce: Your Honor, I object to the question again because Mr. Herwitz, although having nominally abandoned the line of questioning which you sustained my objection to, is now proceeding to do that with another form of question.



1096

*Defendants' Witness, William D. Rawlins, Cross*

The Court: Oh, I think this question is all right. You went into the relevant matter quite similar to this with Judge Maguire. Just how closely connected they are it is difficult to say, but when the testimony is in I will know.

Mr. Bruce: The question, though—perhaps your Honor did not hear the tail of the question.

The Court: Yes, I did hear it.

1097

Mr. Bruce: The tail of the question is, did you discuss outside the hearing of the union officials the costs of the Fair Labor Standards Act in the operation of buildings. That is the substance of the question. You see the tail of the question goes right back to the line of questioning which Mr. Herwitz has purported to have abandoned.

Mr. Herwitz: If your Honor please—

The Court: No, I think this question is all right.

Mr. Herwitz: If your Honor please, despite your Honor's ruling, I feel that these constant interruptions on the part of my adversary are calculated to tell the witness or indicate to the witness or signal him, and I think—

1098

The Court: Mr. Herwitz, that did not indicate anything to the witness.

Q. Mr. Rawlins, as a labor negotiator, I ask you to put yourself back to these conferences in 1938 resulting in the McGrady agreement, and I ask you, as a labor negotiator, whether or not from the owners' point of view you would have preferred a minimum reduction of four hours in the maximum number of hours set forth in the contract without any wage increase or a decrease—

Mr. Bruce: Your Honor, I object to that, not only as to the form of the question but also—

Mr. Herwitz: Now I haven't even finished my question, your Honor, and I think he ought to allow me that courtesy.

The Court: I think, Mr. Bruce, you object before the question is put in. Apparently Mr. Herwitz has got a line of cross examination that he wants to follow through, and I think that you do sort of throw off his trend of thought.

Mr. Bruce: I apologize both to you and to Mr. Herwitz if I have interrupted his thought. I did not mean to do that. I meant to make an objection in good faith. I thought the question had been finished.

Mr. Herwitz: Well, I will hold up my hand, Mr. Bruce.

1100

Mr. Bruce: It is such a long question.

(Discussion off the record.)

The Court: Now, Mr. Bruce, let Mr. Herwitz put his question completely and do not interrupt because they are rather difficult, some of these questions, to formulate.

Mr. Herwitz: Will you read the question so far, please?

Q. (Question read.)

Q. (Continuing) —or a reduction of one hour from 48 to 47 and a wage increase of one dollar per week.

Mr. Bruce: Well, just for the record, now that the question is finished, I object to it as being entirely immaterial to this witness. It is a speculative question.

1101

The Court: Mr. Bruce, I overrule your objection. I think you are entitled to know why I do it, because you have raised a defense here that there was a mistake of fact and of law, both.

Mr. Bruce: Right.

The Court: This may have a remote bearing on that. Your objection is overruled.

Mr. Bruce: Well, I agree with your Honor. If

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*Defendants' Witness, William D. Rawlins, Cross*

it has a bearing, it is very remote. It has nothing to do with the mistake alleged.

The Court: The objection is overruled.

Mr. Bruce: Exception.

The Witness: Now may I have the question read?

Q. (Question read.) A. Why, I don't think there was any opinion expressed. A comparison of that kind was not raised. I never thought of it from that angle.

Q. I am asking you that question now, Mr. Rawlins.

1103

A. Well, I would have to take a pencil and pad and figure it out and see which would work out the best.

Q. We will let you have that, Mr. Rawlins.

The Court: No, we won't now. If he had to do it, it takes some little time. Do it over the recess.

Mr. Herwitz: I do not think it will take very long, your Honor.

Mr. Bruce: Your Honor, Mr. Herwitz can in his brief and in his final argument, if he wants to—and I assume the purpose of it is to calculate whether it is going to cost more to grant the demand in one form more than in another. It is purely a mathematical calculation, and there is no necessity why the witness should do it.

1104

The Court: We have to adjourn at four o'clock, this afternoon. I would like to make some headway.

Mr. Herwitz: If your Honor please, I do not think it should be my duty to disclose in advance of the answers of this witness the purpose I put the question for, but it is not to show which is better. It goes to the credibility of this witness.

The Court: I suppose that is a part of the purpose of your questioning. The reason that I suggested we make these computations later, after we adjourn, is so that we can get along with the cross

*Defendants' Witness, William D. Rawlins, Cross.*

1105

examination. It might take him several minutes to figure it out—would it?

The Witness: I think it will take quite a little time, depending upon the circumstances.

Q. What factors would you take into consideration?

A. Why, I would take the schedule in the building, the wage the man is getting.

Q. Would you say generally— A. All the facts. You can make up a schedule that would fit in.

Q. Yes. Would you say generally, other things being equal, that a reduction of four hours in the amount of work from 48 would increase the labor cost by one-twelfth?

1106

Mr. Bruce: Your Honor, I object to this.

The Court: Your objection is overruled. I think this is proper.

Mr. Bruce: Does this go to the question of credibility alone?

Mr. Herwitz: Yes, yes.

Mr. Bruce: I still object.

A. Well, again, I think that would depend on the schedule in the building and how you could work out the schedule. You might reduce a man from 48 to 44 hours, and then have some lapses of the services in the building.

1107

Q. Yes. Mr. Rawlins, when you are negotiating for one hundred or more buildings, you do not have the schedule of each individual building before you, do you?

A. No, I never have.

Q. So that you are not able, when you are negotiating for 100 or 1,000 buildings, to have such facts and figures before you, are you? A. Oh, I have a negotiating committee who are familiar with it.

1108 *Defendants' Witness, William D. Rawlins, Cross*

Q. But they do not have the facts concerning each individual building, do they? A. Well, they have the facts concerning the buildings they manage and operate, and the facts concerning the buildings that they may have had questionnaires from.

Q. But when you negotiate for 100 or 1,000 buildings, you have general rules that you use in regard to these 100 or 1,000 buildings, without knowledge of any particular building; isn't that so? A. Well, there may be knowledge of a particular building.

1109 Q. Mr. Rawlins, isn't it a fact that you yourself have stated on innumerable occasions that the reduction of four hours from 48 would mean an increase of labor costs of at least one-twelfth? A. No, I never said that at all. I never put it in those words. Those are yours, not mine.

Q. Well, what words did you put it in? A. I never put it that way. I said that a reduction of hours would mean an increase in labor cost.

Q. Without trying to— A. I have never gone into the details at all. I do not recall at any time in any of these conferences of getting into that angle of the discussion.

1110 Q. In the National War Labor Board negotiations, isn't it a fact that the Realty Advisory Board, of which you are secretary— A. Yes.

Q. Submitted to Mrs. Epstein, who is the mediator appointed by the Mayor, a statement of the amount of increased labor costs which would result from a reduction of hours.

Mr. Bruce: Your Honor will bear in mind that the National War Labor Board negotiations took place in May or June, 1942, after the end of the period of this suit, and I object again to this question and to this line of questioning. I take



*Defendants' Witness, William D. Rawlins, Cross*

1111

it that my objection before related to all of these questions.

The Court: Yes, sir.

Q. Isn't it a fact, Mr. Rawlins? A. I do not recall it specifically. It might have been, but I do not recall any statement of that kind being put in except a general statement about the reduction of hours would increase costs. There was a set of figures worked out on the basis of the union's demands, with your increased vacation demands and the extra vacations and all that.

That was calculated, and as I remember it, it meant an increase of some thirty per cent in the labor costs. 1112

Q. And in the calculation that you are now referring to, didn't they assess the labor cost for a reduction from 47 hours to 40 hours per week? A. I have forgotten whether that is the figure or whether that was the basis.

Q. Well, didn't you participate—weren't you present when that was done and didn't you participate— A. No.

Q. —in assessing the labor costs that would flow from a reduction in hours alone? A. No. That work was delegated to three different committees, one operating on the apartment houses, one operating on loft buildings, and one operating on office buildings, and men who are specialists in operating those particular types of buildings took the union demands and figured out the increase in the labor cost that would result if the union demands had been established. 1113

Q. Mr. Rawlins, you kept minutes of these meetings, didn't you? A. Why, I made notes.

Mr. Bruce: What meetings?

A. You mean the meetings—

Q. The McGrady meetings. A. I kept notes.

Q. Yes. A. And I dictated them after I got back to the office that night, or the next morning.

1114 *Defendants' Witness, William D. Rawlins, Cross*

Q. You said nothing in any of those minutes or in any of the notes that you kept about statements by Mr. Maguire, did you, concerning the Wage and Hour Law and its applicability to the employees involved in this dispute? A. Well, I would like to look at the minutes before I answer positively, but my recollection is that, as I testified, the discussion of the Federal Wage and Hour Act was so short, it was so much the consensus of everybody that it just wasn't important enough to justify anything.

1115 Mr. Herwitz: I move to strike the answer out as not responsive.

The Court: Strike it out.

Q. You did not make any mention in your minutes? A. Let me see the minutes and I can tell you.

(Minutes handed to witness.)

Q. Now that might take you some time to read, Mr. Rawlins. You don't remember whether you did or not, is that your testimony? A. I don't recall having done so.

1116 Q. All right. The minutes will speak for themselves. How soon after these meetings did you dictate the minutes? A. Why, either immediately after returning to the office, or if it was late, as it often was, the next day.

Q. What newspaper do you read, Mr. Rawlins? A. Oh, I usually read the Tribune and the Sun and maybe the News. Sometimes the Telegram and sometimes the Times.

Q. Did you read the article of the New York Herald Tribune on the day or the day following the commencement of the action in the Federal Court by the Government against the Arsenal Building? A. I don't know whether I did or not.

*Defendants' Witness, William D. Rawlins, Cross*

1117

Q. Well you keep, do you not, Mr. Rawlins, all newspaper clippings involving labor situations in the building service field? A. Those that affect our particular industry.

Q. Well, this is one that affected it, did it not? A. Well, I dare say that you will find that in our clipping book. That does not mean that I read it.

Q. Well, did you give out a statement to the newspaper? A. As I remember it, I did make a statement to the newspaper.

Q. And did you, in the statement that you made to the newspaper, say that the union had been of the opinion that the Fair Labor Standards Act did not apply? A. I do not recall it; it is so long ago.

1118

Q. Did you ever make any public claim to that effect? A. What is that?

Q. Did you ever publicly make such a claim? A. In those words?

Q. Yes. A. I do not recall that. Maybe I did.

Q. Did you know that the union was co-operating in the bringing of the suit? A. Oh, the union said so in its magazines.

Q. And you read the union magazines? A. I used to read them—they used to send it to me but after the hearing before the War Labor Board they took my name off the list.

1119

Q. That was not because they thought you could not read, was it? A. No, it was because we introduced some of the magazines and some of the statements that were made in the magazines into the hearing before the War Labor Board.

Q. Well, up to that time you read the union magazine assiduously, is that it? A. Well, I wouldn't say assiduously but I used to read it.

Q. Would you say that in October, 1939, at least you knew that the union intended to find that the Wage

1120

*Defendants' Witness, William D. Rawlins, Cross*

and Hour Law affected these employees? A. I don't remember the date. I don't even remember any particular article, but I do know that there was a statement made in the magazine and that my recollection of it is that it was after the Killingbeck case, that the union was making the survey of the unions with the idea of starting a test suit.

1121

Q. Did you ever estimate the cost to building owners in Manhattan in the event that the Government was successful in establishing that the Fair Labor Standards Act applied to the employees of the Arsenal Building?

Mr. Bruce: May I inquire, is this on the question of credibility again?

Mr. Herwitz: It is.

A. Yes, I made an estimate of it.

1122

Q. Now when the Government started its action in March, 1940, you had no doubt in your mind at that time that if the Government was successful in that action that the employees involved or covered by the McGrady agreement, who were working in excess of the number of hours prescribed by the Fair Labor Standards Act, would have an action to recover back overtime compensation?

Mr. Bruce: Your Honor, that is a legal question. That is the very question we have in this suit, whether or not these employees do have a cause of action.

Mr. Herwitz: I am trying to—

Mr. Bruce: And Mr. Rawlins' opinion on that isn't any better than mine.

Mr. Herwitz: If that isn't telegraphing, your Honor.

The Court: Are you asking me whether that is telegraphing?

*Defendants' Witness, William D. Rawlins, Cross* 1123

Mr. Herwitz: If your Honor please, I think it should be apparent that they resolve I should not have an opportunity to really cross examine this witness.

The Court: I am beginning to think that, myself, but I think you are having pretty full opportunity to cross examine.

Mr. Herwitz: May I then continue to have that opportunity?

The Court: I should think so.

Mr. Herwitz: And may he answer the question, your Honor? 1124

The Court: I cannot see why that question is material myself.

Mr. Herwitz: You can't see why it is material?

The Court: No, I don't quite see it.

Mr. Herwitz: If your Honor please, the defense in this action is, among others, that the defendants, relying for three and a half years upon the representations and the actions of Mr. Greenberg, calculated their labor costs and are unable to get back into a position where they can recoup. I want to show through this witness, who is a representative of realty owners in this city, and who participated in the negotiations leading up to the McGrady agreement, that as far back, certainly as far back as 1940, they were aware that if the Government was successful in its prosecution that they would be mulcted in damages in a substantial amount. 1125

Mr. Bruce: Your Honor, we had a right to rely on the honor of this union, having signed an agreement. The fact that the Government starts a suit against us doesn't give us notice that we are going to be mulcted in damages.

Mr. Herwitz: Maybe it does. That is what I want to bring out.



1126 . *Defendants' Witness, William D. Rawlins, Cross*

Mr. Bruce: Let Mr. Herwitz tell your Honor why this test suit was not brought as an employees' wage suit instead of an action by the Government, to restrain future violations, marked as a test case.

Mr. Herwitz: If your Honor please, if Mr. Bruce wishes to call me as a witness, I shall not claim any privileges as I shall testify. I have not the slightest idea—

1127

The Court: I haven't ruled against you. All I said was that I myself could not see why that question was material. There is no objection to it, so go ahead.

Mr. Bruce: I did object to it, your Honor. I meant to object to the question.

The Court: The question is allowed. I am going to be pretty liberal now because I think we are wasting a good deal of time in discussion. Go ahead.

Mr. Bruce: What was the question?

The Witness: I don't remember the question, your Honor. Would you mind reading it to me again?

1128

Q. (Question read.)

Q. (Continuing) You believed that, didn't you?

Mr. Bruce: Just a minute. I object to the question.

Mr. Herwitz: I thought we had a ruling on it.

The Court: Yes, I allowed the question. You see, you have injected the question of a mistake of law and fact.

Mr. Bruce: The mistake, your Honor, that was alleged is a mistake of law and of fact. In 1938, when the Extended Mahoney Agreement was carried on, October 24, 1938, and in February 24, 1939,

*Defendants' Witness, William D. Rawlins, Cross*

1129

and the mistake alleged was as to the application of the Fair Labor Standards Act in 1938 to this employment relationship involved in this suit. Mr. Herwitz is now asking him about something that Mr. Rawlins did after March, 1940, when the Government started an injunction suit against one of these owners, and asking him whether he determined that they would have a lawsuit against these defendants. He is asking him—I mean lawyers today don't know, Courts don't know whether these employees have a lawsuit. We will have to go to the Supreme Court of the United States to decide that question.

1130

The Court: The question is allowed.

A. Well, I haven't any particular idea about the retroactive feature of this bill, if it was made applicable. The thing I was concerned with was the future, and I figured that if the Act was held to apply that it would mean increased costs to the owners. You see, up to that time—at the time, I think, I had made up that estimate, the only decisions that you had anywhere, particularly in this state, you had a unanimous decision in the Court of Appeals—in the Appellate Division, rather—to the effect that the Act did not apply. I may be wrong about the dates because I have depended upon counsel for that angle of it, but I think that at that particular time there had been some decisions in some of the District Courts to the effect that the Act did not apply. You must remember that even Judge Hand said the score was all against him when he handed down that decision.

1131

Q. You say, Mr. Rawlins, that you were concerned at the time the Government's case was commenced, not with any retroactive claims that the employees might have—is that correct? A. That is right. It never occurred to me that there would be retroactive pay due under

1132

*Defendants' Witness, William D. Rawlins, Cross*

that Act; maybe that was stupid, but that was my feeling.

You see, where you and I are differing, Mr. Herwitz, is this: we entered into this contract in absolute good faith with the idea that the men were to get so many dollars a week for so many hours of work. You always seem to lose sight of that fact. That is the understanding of everybody.

1133

Q. Mr. Rawlins, on what basis did you compute the estimated cost to the buildings in Manhattan in the future if you were not concerned with the retroactive results of the Federal suit? A. Well, I figured it on the reduction in hours and the additional help that might be required and the added cost of running the building.

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Q. Mr. Rawlins, I thought I understood you to say that you did not consider yourself qualified to speak about the cost to building owners in the event there was a reduction in hours? A. I said that I was not an expert and that I did not run buildings, and I got advice from people who had that experience. I made up that estimate as purely a mathematical proposition on the question of hours, on the schedules as they existed and the increased costs. As I remember it, I think I figured time and a half for those extra hours in the estimate. I am not certain. I would have to look at one to refresh my memory.

Q. You are referring to the estimate which you made which appeared in the Herald-Tribune, is that right, and the statement of yours which appeared in the Herald-Tribune? A. Oh, that statement was a very general statement. Somebody called up and wanted to know how many millions of dollars were involved.

Q. Yes. A. I am speaking about an estimate that I made and mailed to our members, trying to indicate to them the seriousness of this thing, if it became effective.

*Defendants' Witness, William D. Rawlins, Cross*

1135

tive. And I think you will find that I also pointed out that one of the very serious factors involved was the encroachment upon State rights.

Q. Well, you are not a lawyer, are you, Mr. Rawlins? A. No.

Q. Were these ideas about encroachment of State's rights own ideas or somebody else's? A. They were mine.

Q. No question about their not being Meyer Greenberg's? A. I don't know about Meyer Greenberg. I never met him.

Q. Yes. Would you say that you relied upon Mr. Walter Gordon Merritt, your counsel? A. I don't think that I ever talked to Mr. Merritt about that particular phase at that time. I talked about it, of course, in a general way.

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Q. At what time are you referring to? A. I mean when the statement was made to the newspapers.

Q. Mr. Rawlins, when the Government's suit was commenced did you make this statement: "The estimated cost"—

Mr. Bruce: Is this exhibit in evidence?

Mr. Herwitz: No. I am asking him whether he made this statement.

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Mr. Bruce: Oh, all right.

Q. (Continuing) "The estimated cost to buildings in Manhattan alone as asked in the Government's action would exceed five million dollars, and would add commensurately to current operating expenses. What this might mean to office and loft buildings throughout the country, all of which would be affected, is beyond estimate." Did you make that statement? A. I think I did.

Q. And when you said that "The estimated cost to buildings in Manhattan alone as asked in the Govern-

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*Defendants' Witness, William D. Rawlins, Cross*

ment's action would exceed five million dollars," what were you referring to? A. The increased costs.

Q. In the future? A. Yes.

Q. And you are sure you weren't referring to the possibility of lawsuits by the employees of these buildings? A. No, sir. I didn't think of the lawsuits.

Q. And what did you mean by the next phrase "and would add commensurately to current operating expenses." A. Just what it says.

Q. What does that mean? A. That it would add to the expense of operating the buildings.

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Q. Well, would you say that you were referring only to current operating expenses in both those statements? A. Current and future. That is all that it was intended to cover.

Q. That the cost would exceed five million dollars refers to current operating expenses? A. That it would increase the annual operation, yes, sir. That is what it meant to cover.

Q. By five million dollars? A. Somewhere in that neighborhood.

Q. Did you read Mr. Bambrick's statement appearing in the newspaper that day? A. Well, I assume that I did, but I do not recall having done so particularly.

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Q. Did you read in the paper that day that Mr. Bambrick said that his organization had contracts with 1,500 loft buildings covering 15,000 men, or about 65 per cent of the loft buildings in Manhattan, and further, that his membership alone, Mr. Bambrick said, would receive at least three million five hundred thousand dollars in back wages. Did you read that? A. I do not recall—

Mr. Bruce: Your Honor, I object to that—

A. I do not recall that, no.

Mr. Bruce: I object to that.



*Plaintiff's Witness, David Sullivan, Cross*

1141

The Court: Why do you object? He says he does not recall it.

Mr. Bruce: All right. I did not think he could answer it. There isn't any proof that Mr. Bambrick made such a statement.

The Court: No, there isn't.

Q. Will you read this article that appeared in the Herald-Tribune and tell me whether you read it (handing)? A. (Witness examines paper.)

Q. Did you read that, Mr. Rawlins? A. Well, I glanced through it. I don't remember everything I read in the papers. Possibly I did. Maybe I did not. I might have glanced through it, and maybe I did not.

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Mr. Herwitz: I have no further questions.

Mr. Bruce: I have no further questions.

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DAVID SULLIVAN, resumed the stand in rebuttal and testified further as follows:

*Cross Examination by Mr. Bruce:*

Q. Mr. Sullivan, you are president of Local 32-B now?

A. Yes.

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Q. And you became the president in June, 1941, did you not? A. Yes.

Q. You were treasurer of the union from at least October, 1938, up till your election as president, is that correct? A. Correct.

Q. And I think you testified the other day that since October, 1938, you had run in Building Service Magazine a column as treasurer, is that correct? A. That is correct.

Q. When did you and the other officers of Local 32-B come to the conclusion that the Federal Wage and Hour

1144

*Plaintiff's Witness, David Sullivan, Cross*

Law was applicable to loft building service employees?

A. Will you repeat that question?

Q. (Question read.) A. I am speaking for myself. I had a feeling when the Act came into effect in 1938 that there was a possibility that the Act would apply to them. I have never changed that feeling, and that is why I was the one who pushed it to the extent that we got a ruling from the Government or through the courts whether the Act would apply or not.

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Q. Well, did the officers of this union act individually or did they act in concert on matters of substantial importance to members of the union? A. Well, as a matter of policy it will be discussed, and what we think is in the best interest of the members we will then act on the particular policy we have established.

Q. Did you discuss your belief as to the application of the Federal Wage and Hour Law to the loft building service employees with the other officers of the union? A. Yes.

Q. With Mr. Bambrick? A. Yes.

Q. And Mr. Maguire, the counsel? A. I do not recall discussing it with Mr. Maguire.

1146

Q. Well, how did you reach this belief? Did you reach it after consulting with counsel or did you reach it from your own intuitions? A. Well, I reached it from the statements issued by administrators under the Act.

Q. In October, 1938? A. That is right.

Q. That the elevator man was engaged in producing goods for commerce? A. That there was a possibility that the Act would apply.

Q. And you discussed this with the other officers of the union? A. That is correct.

Q. Did the other officers of the union agree with you in October, 1938, as to the possibility that the Act would apply? A. I wouldn't say they agreed or disagreed. As laymen I don't think we would be in a position to defi-

nitely know whether the Act would or would not, and as far as the realty interests are concerned—

Q. Just a minute. I asked you a question, and not to make a speech.

Mr. Herwitz: I move to strike out counsel's remark.

The Court: No, I won't strike it out. I will let it stand.

Mr. Bruce: That is right.

The Court: As an indication that you both make too many side remarks—as a warning.

Mr. Bruce: What was the answer, please.

(Answer read.)

Q. So that your conclusion or your feeling, as you expressed it, that the Act applied, perhaps, or might apply, was not worth much because you are a layman—are you not? A. Well, in the legal sense I guess it wouldn't be worth much.

Q. I show you now Defendants' Exhibit K, which is the Building Service Magazine for October, 1939, and ask you whether you read the president's page before it appeared in that magazine (handing)? A. I did not.

Q. Did you read it after it appeared? A. I might have.

Q. Well, don't you read and didn't you read in the period from October, 1938, up to this date every copy of this magazine pretty thoroughly from cover to cover? A. No.

Q. Well, is it your testimony that you did not read this statement on page 3 of Defendants' Exhibit K? A. I might have read it.

Q. Or that you do not recall? A. I do not recall exactly.

Q. Did you ever, between October, 1938, and October, 1939, in your column in Building Service, express the opinion that the Wage and Hour Law was applicable to

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*Plaintiff's Witness, David Sullivan, Cross*

the employees in loft buildings in New York City? A. I think I very much confined my column to finances during that period of time. I was the treasurer.

Q. You always confined it to finances? A. No.

Q. Sometimes you talked about the contracts that the union had entered into and what the effect on the membership would be, didn't you? A. I might have, yes.

Q. Do you know when the Wage and Hour Law was passed? A. 1938.

Q. June, 1938? A. I couldn't tell you the exact month.

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Q. Well, when did it become effective? A. I think it was in October—isn't it—1938.

Q. That is correct. Did you, as an officer of Local 32-B, consider the passage of the Wage and Hour Law as a substantial achievement for the members of your union? A. Yes.

Q. And when did you so consider it, when it was passed in October, 1938? A. Well, the law itself, when it came on the statute books.

Q. June, 1938? A. If it would apply, I believe it would be of substantial benefit to the members. Any Act that would reduce long hours would be of benefit, especially building workers who were working long hours at that time.

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Q. And yet isn't it a fact, Mr. Sullivan, that from June, 1938, when the Wage and Hour Law was passed, until October, 1939, that the Building Service Magazine did not even mention the passage of the Wage and Hour Law? A. I don't know if it is true or not.

Q. All right. I show you the copies of this publication from June, 1938, to October, 1939, and ask you to indicate where within the pages of these magazines your union and you, as treasurer, in your column ever gave any mention to the Wage and Hour Law as being of benefit to the members of your union (handing)? A. If you say it is not in there I guess it is not in there.

*Plaintiff's Witness, David Sullivan, Cross*

1153

Mr. Herwitz: Well, we are not conceding it is— what months are they?

Mr. Bruce: June, 1938, to October, 1939, inclusive.

A. (Continuing) I do not want to take the Court's time. I might add, Mr. Bruce, that there is other mediums of reporting to our members, through meetings, which is the proper place.

Mr. Bruce: I move to strike that addition out as not responsive.

The Court: Strike it out.

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Q. Believing that the Wage and Hour Law was applicable to the employees in the loft buildings in New York City in October, 1938, you, along with the other officers of the union, negotiated, did you not, in February, 1939, and signed on behalf of the members of your union a contract with the members of the Penn Zone and Midtown Associations, providing for 47 hours' work with payment of time and a half after 47 hours, and not after 44, 42 or 40, as provided in the Wage and Hour Law, is that correct? A. That was not collective bargaining agreement entered into. That was something that was shoved down our throats by the Mayor of New York City.

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Q. Well, did you protest to the Mayor that you were being forced to sign an agreement in violation of Federal Law? A. I certainly protested to signing this agreement, to going along with it.

Q. I asked you, did you protest to the Mayor of the City of New York that the agreement that he asked your union to sign was a violation of Federal law? A. I did not.

Q. Mr. Sullivan, when your union negotiates an agreement you endeavor to obtain all that the members of the union are lawfully entitled to, do you not? A. That is correct.



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*Plaintiff's Witness, David Sullivan, Cross*

Q. And has anybody ever compelled your union to sign an agreement prior to 1942, July of 1942, when the War Labor Board ordered you to? A. I still maintain that we were compelled to accept that agreement in 1938, which our members did not want to accept.

Q. How were you compelled? A. There was no alternative left.

Q. Why wasn't there any alternative? A. Because we wanted to go along at that time and to avoid having this organization of ours destroyed.

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Q. Was there any law that prevented you from striking for what you were lawfully entitled to, to so claim?

A. And create chaos where half the men would be locked out and the other half would work, which you people wanted at the time?

Q. Well, you had an arbitrator under the McGrady agreement, did you not? A. That is correct.

Q. And that was Edward F. McGrady, was it not? A. Yes, sir.

Q. Did you ever ask Edward F. McGrady between February, 1939, and February, 1942, to grant the payment of time and a half overtime to loft building service employees in New York City? A. No.

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Q. Did you ever ask during that time, that period of the McGrady agreement, the Penn Zone and Midtown Associations and their members to pay overtime under the Wage and Hour Law? A. No.

Q. Did you appear before Mr. Sidney Wolff as an arbitrator in August, 1940, under the McGrady agreement? A. No.

Q. Did your union appear before him? A. Yes.

Q. Are you familiar with the demands they made in that arbitration? A. I believe I am, yes.

Q. Isn't it a fact, Mr. Sullivan, that your union in August, 1940, after the commencement of the Federal Government suit against the Arsenal Building, under the

*Plaintiff's Witness, David Sullivan, Cross*

1159

Wage and Hour Law, made no demand to Mr. Wolff for payment of time and a half overtime under the Federal Wage and Hour Law? A. I don't believe we could make it with the agreement we had.

Q. Why not? A. There is no provision in there. It is confined to just a matter of wages. Hours were set already by McGrady.

Q. Oh, the hours under the agreement, the 47-hour week was binding on the union, then? A. Well, there is no alternative left.

Q. Is overtime wages in your opinion as a labor leader? A. I don't believe they are. That is my opinion, my personal opinion. I don't believe so.

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Q. Well, if you were bound, as you say, by the hourly provision of the contract requiring your men to work 47 hours a week, you at least were entitled to reopen before Mr. Wolff the subject of wages, were you not? A. Yes, wages.

Q. And you say that you don't consider overtime as being wages?

Mr. Herwitz: I object to the question. I do not think it is clear as to what he is talking about.

The Court: I think it is clear.

Mr. Herwitz: I further object on the ground that the only inquiry which has any relevance is whether overtime comes under wages in the light of the McGrady agreement, and the part which allowed for reopening for wages. I think that is material for the Court to construe.

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The Court: The objection is overruled.

Q. What is the answer? A. Will you read the question, please.

Q. (Question read.) A. Yes. I don't consider them as wages. It is nothing to take home, what I consider wages. Our men don't make overtime.

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*Plaintiff's Witness, David Sullivan, Cross*

Q. What do they do with the overtime if they don't take it home? A. They don't.

Q. Isn't there a provision, or wasn't there in the McGrady agreement for time and a half after 46 or 47 hours? A. That is correct.

Q. And if the men worked overtime, didn't they take that time and a half home? A. Yes, sure.

Q. Was that wages when they took it home? A. If they work it, naturally, yes.

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Q. Well, your men did work more than 44, 42 or 40 hours between February, 1939, and February, 1942, did they not? A. They worked 47 hours.

Q. Right, and wasn't that overtime, according to your feeling, or your belief, under the Federal Wage and Hour Law? A. Yes, it would be, if they worked 40 hours straight time and time and a half for hours over 40.

Q. And if they had been paid as you say now they should have been paid, time and a half after 44, 42 and 40 hours for hours worked in excess of those standards, that would have been wages, would it not? A. Yes, sir.

Q. But you did not, before Mr. Wolff in August, 1940, ask for such wages, did you?

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Mr. Herwitz: I object. The question has been asked and answered many times before.

Q. Mr. Sullivan, you were the president of the union in December, 1941, were you not? A. That is right.

Q. And according to your testimony you must have believed, then, that these loft building service employees were under the Act, did you not? A. That is right.

Q. And you were the chief negotiator of the union at that time, were you not, as president? A. That is correct.

Q. Well, believing that the men were under the Act, did you in the demands that you presented to the Penn Zone and Midtown Associations, in December, 1941, ever

*Plaintiff's Witness, David Sullivan, Cross*

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demand the payment of time and a half overtime under the Federal Wage and Hour Law?

Mr. Herwitz: Mr. Bruce, are those demands in evidence?

Mr. Bruce: Yes, sir, Mr. Herwitz.

Mr. Herwitz: I object on the ground that it speaks for itself.

The Court: I will sustain the objection except I think it will save us a little time if the witness looks at them. I do not think you are prejudiced.

A: (After examining) We always asked for a 40-hour week, time and a half over 40.

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Q. I asked you, Mr. Sullivan, whether or not you demanded time and a half after 40 hours pursuant to the Federal Wage and Hour Law in these demands?

Mr. Herwitz: Wait a second. Now wait a second.

A. We asked for 40 hours a week—

Mr. Herwitz: Wait a second, Mr. Sullivan.

Mr. Bruce: I withdraw the question.

Q. When you negotiate a contract you negotiate for the benefit of the members of the union, don't you?

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A. That is correct.

Q. And Meyer Greenberg is a member of this union, is he not? A. Yes.

Q. And your union has boasted and taken a good deal of pride in the fact, has it not, in the last four or five years, that it observes and honors the sanctity of the contracts it makes. Isn't that a fact? A. That is right. We always do.

Q. You have advertised that fact in the newspapers, have you not? A. That is so.

Q. I show you this, what purports to be a reprint of an ad in the New York Post on May 11th, 1940, Mr.

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*Plaintiff's Witness, David Sullivan, Cross*

Sullivan, and ask you whether you ever saw that when it appeared (handing)? A. Yes.

Q. Did you assist in its preparation? A. No.

Q. Did you approve of its publication? A. I did.

Q. As a matter of fact, you must have certified the vouchers that paid the Post for the advertisement, did you not? A. That is correct.

Mr. Bruce: I offer this in evidence.

Mr. Herwitz (after examining): That is a fine statement. I have no objection.

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Mr. Bruce: I thought you wouldn't.

(Marked Defendants' Exhibit L.)

The Court: What is that?

Mr. Bruce: This is a full page ad which appeared at the time of the World's Fair in the New York Post.

The Court: What date?

Mr. Bruce: May 11, 1940.

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Q. Mr. Sullivan, paragraph 4 of this ad, Defendants' Exhibit L, reads as follows: "The long hours once imposed upon the industry have been drastically reduced and further reductions are guaranteed by existing agreements." The McGrady agreement was an existing agreement at that time, was it not? A. Yes.

Q. And also the Sloan agreement involving buildings on the other side of New York? A. Yes.

Q. I now refer you to paragraph 13, which reads: "We are proud of a record that recognizes the sanctity of contracts. When our union signs an agreement we live up to it." Does that statement in paragraph 13 refer to the McGrady agreement as one of the agreements that you live up to? A. Any agreement that we ever pen our names to we live up to.

Q. And that goes for the extended Mahoney agreement? A. That goes for any agreement.



*Plaintiff's Witness, David Sullivan, Cross*

1171

Q. And the McGrady agreement? A. Any agreement that we sign.

Q. And the Meyer agreement? A. Yes, sir.

Q. Have you read the Wage and Hour Law? A. To some extent, yes.

Q. Well, you must have read it because you said you did not consult counsel originally. You read it when the Act was passed, did you not? A. Yes. There was a lot of agitation in the papers about it at the time.

Q. Do you know whether there is anything in the Act that would require a member of Local 32-B to sue an employer for back wages under the Federal Fair Labor Standards Act? A. I don't know.

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Q. Do you know?

The Court: Mr. Bruce, I am sorry, but we will have to adjourn now. I have this meeting upstairs at four o'clock, and I have to stop in my chambers and do one or two things before four o'clock.

Mr. Bruce: I can finish in two questions or have Mr. Sullivan come back, whichever you desire.

The Court: I suppose Mr. Sullivan will have to come back.

The Witness: I would much prefer not to, Judge.

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The Court: Well, if you have only two questions.

Mr. Bruce: That is correct.

The Court: Do you have any questions?

Mr. Herwitz: No.

The Court: All right, we will oblige Mr. Sullivan.

Q. Would you say that Local 32-B has discouraged the bringing of suits against owners of loft buildings in New York City for back wages under the Act? A. We have not.

Q. Have you encouraged them? A. No.

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*Plaintiff's Witness, David Sullivan, Cross*

Q. Didn't you tell the plaintiff, Meyer Greenberg, not to settle with the Arsenal Building for straight overtime? A. I never had any discussion with Meyer Greenberg on a question of settlement with the Arsenal Building.

Q. Did you ever discuss it with anybody and tell him to advise Meyer Greenberg and the employees of the Arsenal Building that they should not settle this suit? A. I never made any reference to the suit at all with anybody from the Arsenal Building.

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Q. You have never expressed the opinion that these suits should not be settled? A. I will say this much, I have expressed my opinion and the opinion is simply this: It is a matter for the individual man himself, between the employer and the employee, to make an adjustment; if he wants to sue, that is his problem, not ours.

Q. Didn't the employees of the Arsenal Building come to you and ask you whom they should retain to bring this suit? A. They never came to me and asked me who they should retain.

Q. Did you go to them and tell them they should retain the union's attorney in this suit? A. I never did.

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Mr. Bruce: That is all.

Mr. Herwitz: That is all.

(Adjourned until February 16, 1943, at 10:30 A. M.)

*Defendants' Witness, Kenneth C. Newman, Direct* 1177

New York, February 16, 1943;  
10:30 o'clock A. M.

Trial resumed.

Mr. Bruce: Mr. Newman.

KENNETH C. NEWMAN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

*Direct Examination by Mr. Bruce:* 1178

Q. Mr. Newman, you are a member of the Bar of the State of New York and also a member of the Bar of this court, are you not? A. Yes, sir.

Q. And you are the regular counsel for the Arsenal Building Corporation? A. Yes, sir.

Q. You do legal work for Spear & Co., Inc.? A. Yes, sir.

Q. Did you have occasion to meet with Mr. Herwitz late in July, 1942? A. In the early part of August of 1942, August 4th.

Q. Will you tell the Court the occasion for that meeting with Mr. Herwitz? A. I called Mr. Herwitz on the 'phone and told him that the letter that he had written to Spear & Company relative to employees in the Arsenal Building had been forwarded to me for reply and that I would like to arrange for a conference with him regarding the same, and that I would bring Mr. Spear along with me. 1179

Q. And did you arrange such a conference? A. We did.

Q. On what day? A. On August 4, 1942, at 11 A. M.

Q. Will you tell us the substance of the conversation between you and Mr. Herwitz at that conference? A. Well, of course, Mr. Herwitz told me that he represented several employees in the building and that by reason of the decision in the Supreme Court regarding

1180 *Defendants' Witness, Kenneth C. Newman, Direct*

the Arsenal Building he was now prepared to collect or to bring suit on behalf of the various employees.

Mr. Herwitz: If your Honor please, for the record I am objecting to this entire line of questioning on the ground that it is irrelevant and immaterial. I might, for the record, quote the case of Emerson v. Mary Lincoln decided by the Court of Appeals and affirmed by the Supreme Court—did it go up, Mr. Goldwater?

Mr. Bruce: No, it did not.

1181 Mr. Herwitz: At any rate, I call your Honor's attention to the fact that it has been held by many courts that the offer or any offer to settle at a straight overtime compensation without liquidated damages, or any offer to settle makes no difference so far as the liability under Section 16(b). I merely state my objection at this time, and I presume that your Honor will overrule it.

The Court: That is the rule, as I understand it. I do not know how it affects the situation here.

1182 Mr. Bruce: Well, this is not the Mary Lincoln case here. There was no plea of equitable estoppel in the Mary Lincoln case. This offer to pay the straight overtime is related to a defense that incorporates all the elements of the estoppel and it goes merely to the question that by virtue of those equitable elements, plus this offer, the suit is barred at least as regards the liquidated damages and attorneys' fees, and I am sure that Mr. Herwitz with his usual candor will not insist that the Mary Lincoln case involves any such defense. I think that this defense is novel in this case.

The Court: I will take it subject to objection. I am not intimating that I think it is material, but your defense is of a rather unusual nature.

*Defendants' Witness, Kenneth C. Newman, Direct* 1183

Mr. Bruce: That is correct.

Mr. Herwitz: Then I take my exception to the entire line of testimony.

The Court: Yes, Mr. Herwitz. I am merely taking it for consideration.

Mr. Bruce: I understand that, your Honor.

The Witness: May I continue, your Honor?

Mr. Bruce: Had the witness finished? I am not sure.

A. No, I had not finished. Mr. Herwitz then asked me what I thought about the situation with respect to these various claims. I told him that I had just recently been to the Wage and Hour Division and had discussed similar situations with loft buildings, the owners of such loft buildings I represented, together with a representative of Spear & Company. I also told him then that the Wage and Hour Division had suggested that we pay those employees who were willing to accept it just straight time and if we could arrange for that they in turn would audit our pay rolls and see that each such employee would get the correct amount, and thereupon their department would also supply us with the form of receipts which each employee would sign upon getting the money but in any event, the money forthcoming under such a plan would have to be approved by the Wage and Hour Division. I then told Mr. Herwitz that I was prepared on behalf of the Arsenal Building Corporation to make him a similar offer; in other words, have the pay roll audited by the Wage and Hour Division, with the supervision, of course, Mr. Herwitz, or his approval, and whatever amount would be ascertained on a straight time basis I was prepared to pay. He turned that down and he said no, he wanted the double pay, and if I didn't let him know in a day or so he would take—he would prepare the necessary papers for a lawsuit. I then

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*Defendants' Witness, Kenneth C. Newman, Cross*

told him, however—I pleaded for an extension of time, I mean, before he would do that, for about a month, saying that Mr. Merritt of your firm was counsel for the Arsenal Building and I depended a good deal on him as to what I should do, and when I asked him for about a month's leeway because Mr. Merritt was out of town and on his vacation at that time, Mr. Herwitz, I think, did say that he would grant me a reasonable time and after that reasonable time had elapsed—I mean he did tell me—he said he had talked with Mr. Merritt and then the action was started.

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Q. When you say you offered settlement on the basis of straight time, you mean the straight overtime as calculated by the plaintiffs in this action or by the Wage and Hour Division without the double amount for liquidated damages and without attorney's fees? A. Without attorney's fees. I must say that, that Mr. Herwitz said, of course, under such a settlement there would be no attorney's fees.

Mr. Bruce: That is all.

*Cross Examination by Mr. Herwitz:*

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Q. Do I understand, Mr. Newman, that I said at that time that I would be willing to settle only on the double basis but that I would in such an event waive any claim to attorney's fees? A. Yes, you did say that.

Mr. Herwitz: No further questions.

Mr. Bruce: Mr. Herwitz refuses to stipulate certain matters, so I think I will have to take the stand.

*Defendants' Witness, Robert R. Bruce, Direct*

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ROBERT R. BRUCE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

*Direct Examination by Mr. Boyle:*

Q. Mr. Bruce, you are the attorney who is trying this case on behalf of the defendants? A. Yes.

Q. Did you discuss the settlement of this case with Mr. Herwitz? A. I did.

Q. After the action was instituted? A. Both before and after.

Q. And when was that discussion had? A. On August 4, 1942, after a meeting at the Bar Building between Mr. Herwitz and myself and Mr. Brown of the Midtown Association or rather of the Realty Board, and Mr. Rawlins, with regard to the negotiation of a contract following the directive of the War Labor Board. I went to Mr. Herwitz's office with him and discussed two wage and hour cases that he was threatening to bring against clients who had retained us. One was the 34 Irving Place Corporation and the other was the Arsenal Building Corporation. Mr. Newman's office had advised me that they had received a letter from Mr. Herwitz threatening action against the Arsenal Building for back wages, and I believe we had either a similar letter in connection with 34 Irving Place or we actually had the summons and complaint—I am not quite sure as to the latter. In substance, I told Mr. Herwitz in his office that as counsel for the Arsenal Building Corporation we were willing, without prejudice to the filing of any defenses, in the event that his clients refused to settle, to pay the straight overtime to all the employees of the Arsenal Building Corporation as calculated by the Wage and Hour Division and as calculated by these plaintiffs in this lawsuit but without the addition of the liquidated damages and without attorneys' fees, and I made the same offer in connection with the Berry case, the 34 Irving Place case.

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*Defendants' Witness, Robert R. Bruce, Cross*

Mr. Herwitz said he would take the matter under advisement and later advised me that he was not willing to settle on that basis. Later, after the action was started, on August 11th or 12th, 1942, on several occasions in connection with extensions of time to answer the case, I believe, I again renewed the offer to Mr. Herwitz but those were refused. I do not recall the exact dates but it happened on several occasions, I believe, in telephone conferences.

Mr. Boyle: That is all.

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The Court: That was the offer you had made, as I understand it, under the same terms as that offer by Mr. Newman?

The Witness: That is correct, and by Mr. Spear.

*Cross Examination by Mr. Herwitz:*

Q. Mr. Bruce, you said that we met on August 4th. Don't you mean August 6th? A. August 6th is right, yes.

Q. August 4th was the date that I met with Mr. Spear and with Mr. Newman? A. That is correct, yes.

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Q. And was August 6th the first time that you and I had the pleasure of meeting each other, Mr. Bruce? A. I believe so.

Q. For any reason? A. I believe so.

Q. Since which time we have seen quite a bit of each other? A. That is correct.

Q. Now, on August 6, Mr. Bruce, we met in connection with an entirely different matter; isn't that so? A. Originally, yes.

Q. Yes. A. Yes, at the Bar Building.

Q. And do you recall that in walking from the Bar Building on 44th Street that you and I and Mr. Brown were walking together? A. Yes, sir.

Q. And Mr. Rawlins—was he with us? A. Yes, that is correct.

Q. Do you recall that Mr. Brown said that he had been the agent who had found me the suite, my office suite for me? Do you recall that? A. I think I recall something like that.

Q. Do you recall that he said that he would like to drop up and see what it looked like, that he had not seen it since it had been fixed up? A. I believe that is correct, yes.

Q. And do you recall that I then invited you and Mr. Rawlins to look at my office and see how it looked? A. I think I invited myself, too.

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Q. That may be. A. For the purpose that I testified before.

Q. You do not wish to indicate that you were not entirely welcome, do you, Mr. Bruce? A. Entirely welcome. I enjoyed it very much.

Q. And it was for that purpose and no other purpose that you came to my office; isn't that correct? A. That is not true. In walking over I said I wanted to discuss other wage and hour cases with you.

Q. I see. Mr. Merritt was away at that time, was he not? A. That is correct.

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Q. And had he been away for some time? A. I believe he had been away since late July, yes.

Q. Your firm represented the Arsenal Building Corporation in connection with the Government's injunction proceeding, did it not? A. That is correct.

Q. Were you separately retained in connection with the action, this present action? A. Yes.

Mr. Boyle: I will object to that.

Mr. Herwitz: I will connect it, your Honor.

A. (Continuing) Yes, we were.

Q. Well, was it subsequent to August 6th? A. No, it was prior to that.

1198

*Defendants' Witness, Robert R. Bruce, Cross*

Q. On written retainer or oral retainer before August?

A. Oral retainer.

Q. Wasn't there some question, Mr Bruce, even after August 6th when you say you discussed this with me as to whether or not your firm would represent the Arsenal Building Corporation in this case? A. Well, the only question was that Mr. Merritt was not in New York and Mr. Spear and Mr. Newman had indicated to me and to somebody else in our office that we were going to be retained.

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Q. You were going to be retained? A. I assumed that we were retained. As a matter of fact, Mr. Newman and Mr. Spear knew of my conversation with you before I made the offer in your office on August 6th.

Q. Well, is it your testimony that you had been retained? A. Yes, it is.

Mr. Herwitz: No further questions.

1200

Mr. Bruce: Your Honor, I have one exhibit I want to offer in evidence. It is possible, I think, that the Court could take judicial notice of it as an official document but I want to offer it in evidence anyway and call attention to particular pages. I am offering into evidence a pamphlet entitled "National War Labor Board's Directive Order, Report and Recommendations of the Mediation Panel in the Matter of Realty Advisory Board on Labor Relations and Building Service Employees International Union, Local 32-B, Case No. 141, dated July 29, 1942." I call attention particularly to the portion marked "Discussion" on pages 33 and 34 of this booklet and to appendix B at pages 70 to 72.

Mr. Herwitz: If your Honor please, I object to the introduction of such a document on the ground that it is hearsay, on the ground that it



*Defendants' Witness, Robert R. Bruce, Cross*

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is a statement of some other group concerning matters not in issue here, and does not in any way relate to the plaintiff, Meyer Greenberg, and does not in any way relate to the buildings involved in the McGrady agreement, and that series of agreements which is apparently in issue here.

The Court: I will take it subject to your objection, Mr. Herwitz.

(Marked Defendants' Exhibit M.)

Mr. Herwitz: And for the other reasons that I have previously urged in connection with the irrelevancy and immateriality of this entire line, and because of the remoteness of the period set forth in this booklet from the time involved in the present dispute.

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Mr. Bruce: Your Honor, the defendants now rest.

Mr. Herwitz: Plaintiff moves to strike out each and every one of defendants' defenses and moves for judgment on the entire case, on their case.

The Court: Decision is reserved.

Mr. Bruce: And the defendants move for judgment on the whole case.

Mr. Herwitz: Well, plaintiff has not rested as to counsel fees.

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The Court: Well, the defendants have rested.

Mr. Bruce: Yes.

The Court: And the plaintiff moves for judgment in its favor or in their favor, I suppose?

Mr. Herwitz: Yes.

The Court: Decision on that motion is reserved.

Mr. Bruce: I will wait with my motion until you put in your attorneys' fees proof.

Mr. Herwitz: Yes. Now I have suggested to Mr. Bruce that the matter of my attorney's fees be left to await the decision of the Court, to see whether it is pertinent, but he thinks I ought to put it in now and so I shall.

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*Defendants' Witness, Robert R. Bruce, Cross*

The Witness: I have nothing more to say.

Mr. Herwitz: Plaintiff rests, your Honor, unless they have some further cross. Unless your Honor wants to ask me some questions, do you?

The Court: No, I do not think I want to ask any questions.

Mr. Bruce: Then the defendants move for judgment on the whole case.

The Court: Decision reserved on that motion.

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Mr. Herwitz: If your Honor please, just so that I make sure that my record is correct—I think I have done this but I want to move to strike out all of the testimony introduced by the defendants on their case for the reasons I have previously stated.

The Court: That motion is denied. Let the record show that this motion is made after we both finished the case, technically.

Mr. Herwitz: Yes.

The Court: But let the record show that this motion is made at this time and is timely.

Mr. Herwitz: Thank you, your Honor.

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The Court: There is no objection to that, is there?

Mr. Bruce: No. It merely confirms, I think, what Mr. Herwitz has stated all the way through.

Mr. Herwitz: If your Honor pleases, Mr. Bruce has something to say.

Mr. Bruce: Mr. Herwitz reminded me that I intended to withdraw the arbitration defense in this case after the trial was completed and both parties had rested. At this time the defendants withdraw the fifth complete defense from their answer in this action. It pleads the arbitration clause of the collective bargaining agreements as a defense, but in doing so it is without waiver of any right to arbitrate the question of recovery over

*Defendants' Witness, Robert R. Bruce, Cross*

1207

against the union under such contracts, in the event that the plaintiffs are permitted recovery in this litigation. The defendants further withdraw the first and partial defense with respect to all persons for whom authorizations to sue have been offered in evidence by the plaintiff, Meyer Greenberg.

By Mr. Herwitz: Now there is one point that I want to bring up here which I never did. Mr. Bruce said that I should have conceded right away, when the McGrady Agreement was put into evidence, something like that, that there was a mutual mistake of law and that the parties all agreed upon it. Now I suggest to your Honor—and I do not like to say this—that there is lacking in this case a certain very significant witness. It seems to me that the one man who was so positive that the Wage and Hour Law did not apply was Walter Gordon Merritt. The one man that might have been brought to this Courtroom to testify that that was agreed by all the parties was Walter Gordon Merritt, and he did not appear. I think—

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Mr. Bruce: Your Honor, I move to reopen the case to call Mr. Merritt if Mr. Herwitz is concerned about it.

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Mr. Herwitz: I will agree to that.

Mr. Bruce: You will?

Mr. Herwitz: Yes, of course.

Mr. Bruce: All right, fine. I had supposed that Mr. Herwitz and I demonstrated amply here that lawyers make pretty poor witnesses, and I had supposed that the three men or at least three of the men who sat with Mr. Merritt throughout this conference and told what he said would be ample, but if Mr. Herwitz is going to ask your Honor to draw any inference from the fact that Mr. Merritt was not called here as a witness, why I insist that

1210 *Defendants' Witness, Walter Gordon Merritt, Direct*

we have the right to call him. He is in Philadelphia today before the War Labor Board and I cannot produce him today, but I certainly could tomorrow.

Mr. Herwitz: I will certainly not interpose any objection whatsoever if he wants to open the case for that purpose, if your Honor so desires.

The Court: Well, if the defendant thinks that you are going to ask the Court to draw the inference, which you suggest now, I should think that it would be fair to allow them to call Mr. Merritt.

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Mr. Herwitz: I will interpose no objection, and I ask your Honor to draw that inference.

Mr. Bruce: Then can we set a time—I am engaged tomorrow in this court—

The Court: I want to do it tomorrow.

New York, February 19, 1943, 10:30 A. M.

Trial resumed.

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Mr. Bruce: Is the Court ready to proceed, your Honor?

The Court: Yes, Mr. Bruce.

Mr. Bruce: Mr. Merritt.

WALTER GORDON MERRITT, called as a witness on behalf of the defendants in surrebuttal, being duly sworn, testified as follows:

*Direct Examination by Mr. Bruce:*

Q. Mr. Merritt, will you tell the Court the circumstances as you recall them, leading up to what is paragraph 2, or the last paragraph of section 2 of the so-called McGrady Agreement. A. Well, I will try to be as helpful

*Defendants' Witness, Walter Gordon Merritt, Direct*

1213

as I can. The negotiations opened up in December and I think I attended—

The Court: 1938?

The Witness: 1938.

A. (Continuing) And I think I attended the first meeting. The meetings immediately following that were attended by Mr. Clifton of my office. I did not attend all—I attended some of the meetings in January, but not all of them. At the very outset, in January, there developed the issue: What would be the situation if any law were passed by the State of New York applicable to these employments which would cover substantially the same ground as the Federal Fair Labor Standards Act? The employers took the position that something must be put into the contract to protect them against any increased liability which would flow out of the adoption of any applicable act by the Legislature of the State of New York.

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My recollection is that at that time there was actually pending in the Legislature of New York State certain bills looking toward the establishment of like labor standards for people in the State of New York. The union, through Mr. Bambrick, took the position through all the meetings that I attended that if by virtue of any such law it were necessary to reduce hours, the weekly wages should not be reduced and the employers were equally insistent that there be no change as to their position, so that no progress was made, as I recall, at that stage of the game, in respect to that matter.

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The parties not being able to agree, finally ended it, as they occasionally do, in the Mayor's office, and the Mayor took the matter in hand. He had before him the contentions of the parties, the union contention, the employers' contentions, and after some negotiations the details of which I do not recall, he called the parties both before him, and, to quote the vernacular, he laid



1216 *Defendants' Witness, Walter Gordon Merritt, Direct*

down the law. He said "These are the terms of settlement. So far as the Mayor's office is concerned, this settles the matter. You will get one dollar a week increase in wages. The hours will be decreased to 47 hours as against 48 for the first eighteen months of the agreement, and then will go further down to 46 hours for the second eighteen months. The agreement will run for three years"—that had been one of the points of debate—"and all other matters not settled between the parties shall be referred to Edward F. McGrady for settlement."

1217 Then he went on to say: "Neither party is going to get more nor less. That is all there is to it, gentlemen. Good-bye."

After that, as I recall it, it was reported to us, and I think reported in the newspaper, that the union accepted that proposal from the Mayor. The employers, if I recall it, accepted the proposal at that time. I think I wrote the answer over lunch hour, at the lunch hour, and we came back and gave our answer definitely to the Mayor, accepting the proposal.

1218 Then we came before Judge McGrady on some of these matters, and again I was not present at all of the meetings but I was present at some of them. The union reasserted its position that if there was any reduction in hours by virtue of law, that they should have the same rate of pay and should not suffer an abatement of pay on account of the reduction of hours.

The employers still insisted that the possible application of the State Act was a matter of somewhat serious moment to them in view of the pending legislation that they must have a different kind of clause which would protect them.

McGrady finally accepted a clause which I think was presented by ourselves, that is, as representing the employer. On that point I am not sure, but it was to the effect that if any law was passed which altered the situa-

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tion then the agreement as to wages and hours should be considered as open to adjustment by negotiations between the parties, and if they could not agree it was then to be taken care of, like these other matters in the dispute, by reference to Mr. McGrady. That was the history behind this clause, this paragraph of Section 2 of the McGrady Agreement to which you refer, Mr. Bruce.

Q. Do you recall the negotiations leading up to the so-called Meyer Agreement?

Mr. Herwitz: If your Honor please, I did not interpose an objection to the original question, but I think your Honor understands that the same objection I have interposed throughout the trial as to the relevancy of this general line is hereby interposed, and the same goes to the present question as to the entire line. 1220

The Court: Yes, I understand it.

Mr. Herwitz: Thank you.

A. Yes, I recall the negotiations in respect to the Meyer Agreement very definitely.

Q. What was said during the negotiations of the Meyer Agreement by any union officials, if you recall, regarding the Federal Wage and Hour Law, in your presence? A. Well, may I state first that from our point of view the situation was fundamentally different at the time of the negotiations of the Meyer Agreement compared to what it was at the time of the negotiations of the McGrady Agreement. At the time of the Meyer Agreement, or at the beginning of the negotiations of the Meyer Agreement, as I recall it, two Circuit Courts of Appeals had decided in two different cases that the Wage and Hour Act did apply to the employment relations covered by this contract, one being the case in Philadelphia and the other being the case, the Arsenal case, which was handled by our own Circuit Court of Appeals for the Second Circuit. We met early in January— 1221

1222 *Defendants' Witness, Walter Gordon Merritt, Direct*

The Court: What year?

The Witness: 1942.

A. (Continuing) And the negotiations were carried on in a way which is quite familiar with matters of this kind. Arthur Meyer, who was then chairman, I think, of the State Board of Conciliation, was the go-between. Part of the time he would talk to each group separately and then part of the time we talked together with Arthur Meyer present, and part of the time we talked together without Arthur Meyer present. We talked perhaps more frankly with the Conciliator alone, or at least could show our hands a little more. That often happens in processes of this kind.

We explained to Meyer—and this was not in the presence of the union representatives—that this had come like a bombshell and that we just couldn't grant any wage increases with this liability hanging over our head, and that is all there was to it.

He said he conveyed that story to the union representatives. We insisted that before anything could be done, before we could consider wages, we would have to know what our liability was for the past, if there were any liability, or to provide some means of putting that in a definite form inasmuch as the decisions of these two courts of distinction had decided against us and we could not tell what the Supreme Court would do. We conveyed this same story directly in joint conference, too. We finally said that we would be willing to settle the contingent liability and get it out of the way as a certainty, and we talked with the union representatives concerning that, and it was agreed that there should be a settlement on the basis of paying 25 per cent of the total liability, the total liability being the full overtime plus the penalty, so that the payment of 25 per cent would be half of the straight overtime, that is, a quarter of the total liability.

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Mr. Sullivan, Dave Sullivan, president of the union, said to me in the room in which we were all gathered together—he said, “I am against this whole thing.” He said, “I think it is absolutely wrong and you have been hooked by this unexpected result,” and none of us expected it,” and he said, “I am willing to do everything I can to make it possible for you people to work out some arrangement so that you won’t be hooked in the future.”

Sidney Cohen then represented Mr. Sullivan and his union. We had thought that thing was finally disposed of. I had drawn up drafts of the clauses—I have the drafts with me today, in my own handwriting as they were drawn up at that time. Then suddenly there came a change in the picture, and the union, for political reasons, said it did not dare go ahead with that proposition. They said, “If we went ahead with it and then the Supreme Court held against you people and held that we were entitled to this money, we would be on the spot. Therefore we have got to find some way of handling that.”

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So I met along with Arthur Meyer and Sidney Cohen in Arthur Meyer’s office and Cohen explained this to me. I think that is the first time it was explained, their embarrassment within their own organization, if they made such a settlement, and I said, “You need have no embarrassment. You did make a commitment. You made an agreement with us, but without even referring the matter to my clients I would relieve you completely from that commitment.” I said, “If we cannot talk across the board here freely and frankly, and then sometimes say things that we want to withdraw, we will never be able to talk freely and frankly to each other, and I for one am opposed to your client being bound by this commitment. If he finds now that it is a commitment which

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*Defendants' Witness, Walter Gordon Merritt, Cross*

he thinks he should not obey, as far as I am concerned, that is out, and we will start over again on another basis."

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So that question of the settlement of a possible liability of 25 cents on the dollar, not including counsel fees, went by the board. In that discussion I think we all said in view of the decisions, the unanimous decisions of these two courts, and in view of what we felt about the law generally, a 1-to-4 bet was about as good a ratio as you could get, and it was that 1-to-4 bet that led to this settlement that was first agreed upon, and finally that of 25 cents on the dollar.

Then when we came to the question of the so-called formula in the Meyer Agreement to protect us against overtime, possible overtime claims in the future, that, as I recall it, was all agreed upon in advance before any of the disputed questions were left to Arthur Meyer to decide.

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As I recall it, Dave Sullivan was perfectly splendid about that. He said, "This is terrible, and I am not for it, and any protection we can give you is satisfactory, and you fellows frame the clause and our counsel take a look at it. The point is, it has got to be a clause which satisfies you provided it doesn't in some way conflict with our interests."

Mr. Bruce: That is all.

*Cross Examination by Mr. Herwitz:*

Q. Mr. Merritt, the so-called Meyer formula, was a formula that you generally as a lawyer were familiar with, is that correct? A. I knew it before these negotiations.

Q. Yes. A. It wasn't in use except in one industry where I drafted it, so far as I know.

Q. And what industry was that? A. Anthracite.



*Defendants' Witness, Walter Gordon Merritt, Cross*

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Q. Could you tell me when it was that it went in use in that industry? A. I think it was June, 1941, or thereabouts.

Q. And was that in connection with a union contract? A. Yes.

Q. And is it still in existence in that industry and still in use in that industry? A. It is still in that contract. The contract does not expire until the close of April of this year.

Q. Will you tell me, Mr. Merritt, when you first drafted that formula for the anthracite industry? A. About that time.

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Q. And would you tell me, Mr. Merritt, when you were first familiar with that method of, let us say, complying with or painless compliance with the Federal Fair Labor Standards Act?

Mr. Bruce: I object to the form of the question, your Honor.

The Court: I missed one of those words.

Mr. Herwitz: I used the words "painless compliance with the Federal Fair Labor Standards Act" and I think Mr. Bruce objects to the word "painless." If he does, I will withdraw it. I think it is descriptive.

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The Court: I think you had better reframe your question.

Mr. Herwitz: Yes.

Q. When did you first become familiar with that method of complying with the Federal Fair Labor Standards Act? A. So far as I know, my office created it.

Q. And would you tell me, Mr. Merritt, when your office did create it? A. It was in the spring or early summer of 1941, according to my present recollection.

Q. Would you tell me, Mr. Merritt, whether or not it was an entirely original creation? I realize this is not a patent or a copyright suit, but nevertheless, could you

1234 *Defendants' Witness, Walter Gordon Merritt, Cross*

tell me that? A. I knew of no like clause prior to the time it was created for the anthracite contracts.

Q. Would it be fair to say that when the McGrady Agreement was negotiated in December, 1938, January and February, 1939, that you did not have the Meyer formula or any similar formula in your mind at that time? A. That is true. At that time I never even faced the problem.

Q. So the answer to my question is that you did not have the Meyer formula or anything like that in your mind at that time? A. I answered.

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Q. And as far as you know, would that be true, Mr. Merritt, of all of the negotiators, on both sides—so far as you know? A. So far as I know.

Q. Now, as a matter of fact, Mr. Merritt, were you convinced of the legality of the Meyer formula? A. Yes.

Q. Did you have any doubts concerning it? A. I did not.

Q. Did anybody express— A. And yet I would say that it would be fair to say that I had a very definite opinion that it was valid.

Q. Yes. A. But I wouldn't have guaranteed it.

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Q. You had a legal opinion and it favored its validity. That about sizes it up, does it not, Mr. Merritt? A. No, it does not.

Q. Well, correct me. A. It is as I stated. I had a very definite opinion in favor of its legality.

Q. You had some definite reservations concerning it nevertheless, did you not? A. I couldn't state it any better than I have, Mr. Herwitz.

Q. Well, would that include the fact that you had certain definite reservations concerning the validity or legality of the Meyer formula? A. Any man who has gone through the situation such as I have gone through in connection with the application of the Wage and Hour

Act, when nobody conceived it was applicable, realizes that even the most set opinions and definite and positive opinions sometimes prove to be wrong. I had that much reservation in regard to this formula, and I would say no more.

Q. Would you say, Mr. Merritt, that you had a very definite reservation until the decision of the Supreme Court in the Belo case on June 8, 1942? A. The Belo case did not confirm my opinion particularly. I do not think—I think I did say, "Well, they approved the proposition," but I really felt so definite as to the right to do what we were doing that I was really quite surprised that the matter should be so open to debate in the Belo case. I think that is what surprised me more than the conclusion.

Q. Yes, and of course you realize that the facts in the Belo case were not exactly the same as the facts in the case at hand, or the Meyer formula? A. I assume that. I do not recall the facts in the case.

Q. Mr. Merritt, did you advise the Arsenal Building Corporation, the defendant in this action, to become signatory to the Meyer Agreement? A. They were members of one of the associations, were they not?

Q. Yes. A. I represented the two associations.

Q. Yes. A. I advised their execution of the agreement which had been negotiated, which is the Meyer agreement.

Q. Yes, and did you advise the Arsenal Building Corporation to refrain from becoming a signatory to the agreement? A. No, I did not advise anybody to become a signatory.

Q. Well, did you know that the Arsenal Building Corporation did not immediately become a signatory to the Meyer Agreement? A. No.

Q. Do you not recall, Mr. Merritt, that the Arsenal Building Corporation notified the union that it would

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*Defendants' Witness, Walter Gordon Merritt, Cross*

comply generally or comply with the terms of the Meyer Agreement but was not immediately making a firm commitment so to do? A. I have no recollection whatsoever of such a situation. If you tell me so, I am even surprised.

Q. Don't you know that it was not until some time in June, 1942, that the Arsenal Building Corporation did become signatory and authorized the union to consider it a full signatory to the Meyer Agreement? A. No, I am not disputing it.

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Q. No, I know you are not. A. If it is in the record it is undoubtedly—

Q. I am shaking my head, Mr. Merritt, because for the first time in this trial I did not bring down all my papers, and that is the thing I should have brought down.

Now I just want to check. I do not think I have it in my papers here, although I may not be sure (examining papers).

Mr. Herwitz: I am very sorry, your Honor. I did not want to bring down all my papers, but I think for what it is worth I should send up to my office for these documents.

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Q. It may be, Mr. Merritt, that if I show them to you, you may recall the circumstances. A. Well, can't we admit what you want to prove?

Q. Well, if you wish. I think that this is the fact, and I ask you whether it refreshes your recollection, that Spear & Company on behalf of the Arsenal Building Corporation, sent a letter to the union at the time the Meyer Agreement was entered into in which they said that they intended to comply with the terms of the agreement but that they should not be considered a signatory to the agreement until further notification or some later date. Now I am quoting. I think it is a fairly accurate quote. You do not remember that at all, Mr. Merritt? A. No, but if it is a fact and it is known to

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counsel here, I think counsel will probably admit it. But I do not know whether it is or not.

Mr. Bruce: Your Honor, I do not know of any such agreement, due to the fact that there was an appeal pending in that case; but I have no personal knowledge of such an arrangement.

Mr. Herwitz: Do you have any correspondence here, Mr. Bruce, between Spear & Company and the union in 1942?

Mr. Bruce: No; I have never seen any such correspondence. How is it material to the issues in this case?

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Mr. Herwitz: Well, I think materiality is another question. I think we want to get the facts.

Mr. Bruce: I thought if you would tell us what you are driving at, maybe we could stipulate it, if it is material.

Mr. Herwitz: No, I am not interested at this time in a stipulation. Thank you very much, Mr. Bruce.

Q. Mr. Merritt, in 1939 you entered into this McGrady agreement which had this clause in it, paragraph 2, relating to future State legislation, is that correct?  
A. Correct.

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Q. As I understand your testimony, it was definitely the union's position that in the event there should be any State legislation affecting wages and hours and reducing hours, that the diminution in hours should not act or result in a diminution of the weekly wage? A. Yes.

Q. Does that state the union's position? A. Yes.

Q. And was the Association's position directly contrary to that? A. Literally, yes; but it did not mean that the association's position was not to the effect that there might be something worked out. It did not necessarily mean that the whole subject would be explored.



1246 *Defendants' Witness, Walter Gordon Merritt, Cross*

Q. Yes. Well, was it the union's position, Mr. Merritt, that in the event of any State legislation, that the matter should be reopened for negotiation between the parties, or, if necessary, arbitration in the event that negotiations did not prove successful? A. I do not think that was the association's position at the outset. That is what it finally boiled down to, to try to reach the position of the union.

Q. I see. Now, what would you say was the association's position at the outset? A. I do not think I recall.

1247 Q. Well, would the association's position at the outset have been that in the event of a decrease in hours, there should be a proportionate decrease in weekly wages? A. You say would it have been?

Q. Does that statement by me tend to refresh your recollection as to whether such a thing did take place and whether that was the association's position? A. I do not recall the association taking that position but I am perfectly ready to concede that our bargaining committee may have started with that proposition.

1248 Q. Well, having been in negotiations with you, I presume you would, and is it your testimony, Mr. Merritt, that the association, in all probability having started off with that proposition, more or less offered to compromise by suggesting that in the event there was any State wage and hour law that the matter should be left open for negotiation and arbitration? A. I think the final position taken by the association was substantially as appears from that written agreement, and that that does represent a compromise situation. I remember the final result more than I do all the details that led up to it.

Q. I have no doubt. The union never departed from its position as to its right to a reduction of hours without any proportionate reduction in weekly wages in the event of State wage and hour law, did it? A. I think it did when it accepted the Mayor's proposal.

Q. Well, that was a matter of some debate in the McGrady agreement negotiations, was it not, Mr. Merritt?

A. I have already so testified.

Q. As a matter of fact it has been more or less—  
withdrawn. A. And I think McGrady decided on that point in favor of the employers.

Q. Well, yes. Your testimony is now, Mr. Merritt, that when you appeared before Mr. McGrady you took the position, did you not, that the Mayor's proposal and its acceptance by the parties in your opinion constituted the limit of the monetary or labor cost concessions that the associations should be called upon to make? A. Exactly.

Q. I think I stated it perhaps not as well as you did, but you did make that argument, did you not? A. I did.

Q. And would it not be correct to say that the union quite vigorously questioned that statement or the validity of the statement? A. As usual.

Q. As usual. And that was one of the matters that McGrady had to decide whether or not you were right in that position or the union was right in its position? A. Right.

Q. Now, when you say that the union departed from its position that statement of yours was not agreed to by the union. The union did not agree to what you say now or the arguments you made were true? A. I was testifying to my interpretation of the union's acceptance of the Mayor's proposal.

Q. Yes. We are concerned here, as you know, Mr. Merritt, with the question of the parties' intentions at the time— A. Well, I think that was the union's intentions.

Q. To do what? A. To accept that as all they could get.

Q. To accept the Mayor's proposal? A. As all they could get for the period of three years in respect to all

1252

*Defendants' Witness, Walter Gordon Merritt, Cross*

the matters that were covered by the Mayor's proposals, which covered wages and hours. I think the union distinctly intended that when they agreed to go along with that.

Q. And that is what you argued before Mr. McGrady?  
A. And Mr. McGrady decided in our favor.

1253

Q. Well, didn't Mr. McGrady decide rather than in your favor, Mr. Merritt, that there might be an increase of labor costs or monetary concessions so far as the employers were concerned, but that that matter would be left open to future negotiation or arbitration? A. I don't know about your exact language but I think he said, "That is a matter that hasn't yet arisen."

Q. Yes. A. "And that is a matter that goes back to me in the event that the question does arise, and it may never arise"—something like that.

Q. So that directly Mr. McGrady did not pass upon and decide the difference between the union and the association, as to the meaning of the acceptance of the Mayor's proposal, isn't that correct? A. Well, my general interpretation was that he adopted the clause we had drawn in that respect.

1254

Q. Now, was there any discussion before Mr. McGrady as far as the possible application of the Federal Fair Labor Standards Act was concerned? A. None that I recall.

Q. Was there anything in any memorandum— A. I wasn't present at all the meetings.

Q. Yes. Did you examine the various memoranda that were submitted by the parties? A. I should have, but I am not prepared to say that I did because at that time I did not attend all those hearings.

Q. Did you ever hear Mr. Maguire, the counsel to the union, say that in his opinion the Federal Fair Labor Standards Act did not apply? A. I cannot answer that question yes or no, but I would like to give an answer.

*Defendants' Witness, Walter Gordon Merritt, Cross* 1255

Q. I will be very happy to hear it. A. I either heard Mr. Maguire say that or heard my clients accurately say that Mr. Maguire said so, and I am not clear in my mind where I got it from, but I remember it so distinctly that he said—that he hoo-hooed it in whatever form the information came to me, and I remember my own personal reaction and my statement that “Eddie is showing some sense.”

Q. I would like to put my question to you again, Mr. Merritt, and ask you this question, or put a new question to you: Do I understand that it is not your definite recollection that Mr. Maguire made any such statement? A. Let me put it my way as I have to reconcile it with my own recollection. I cannot say whether Mr. Maguire said that to me or whether it was said to me by one of my own clients at that time Mr. Maguire had said it. Therefore the answer to your question is that I have no definite recollection which I can visualize at this moment of Mr. Maguire before me either sitting or standing and making such a statement. 1256

Q. Then would your answer be that you just do not remember he made such a statement to you or in your presence? A. Right.

Q. Will you look at Plaintiff's Exhibit 13, and read point of difference A, Mr. Merritt, before I put my next question to you (handing)? A. May I see what it is first (examining). 1257

Mr. Bruce: What is Plaintiff's Exhibit 13, the union's memorandum?

Mr. Herwitz: Yes.

The Witness: Yes.

Q. Do you recall ever seeing that memorandum before?

A. No.

Q. You do not testify that you never did see it, do you?

A. I do not.

1258

*Defendants' Witness, Walter Gordon Merritt, Cross*

Q. Would you say, Mr. Merritt, that the phrase there, "Application of existing laws" would apply to future State legislation concerning wages and hours? A. Why are you asking me to distort clear language?

Q. All right. Would you say that that language refers to the Federal Fair Labor Standards Act? A. I would say no. May I explain or don't you care me to explain?

The Court: What is the date of that memorandum, please.

1259

Mr. Herwitz: It would have been February 1939, your Honor. I do not think the specific date is on there.

Q. Is it, Mr. Merritt? A. (After examining) This is the memorandum put in by the union before McGrady?

Q. Yes. Yes, I will be pleased to have your explanation. A. I think if I am given the opportunity of exploring Eddie Maguire's mind and having known Eddie Maguire for many years, he simply meant to put in a general catch-all clause as to any legal advantage that they might get from any present law or laws hereafter passed. It was a very natural thing for a lawyer to do. I do not think it is at all inconsistent with the possibility that he  
1260 may have said the law did not apply.

Q. Well, of course you realize, Mr. Merritt, that you have argued and you have not answered my question. Is that about right? A. No, that is not right, if you go back in the record.

Mr. Herwitz: What was the question?  
(Record read.)

Q. All right. Now Mr. Merritt, Point of Difference A and the matter contained therein, refers only to a wage and hour law, does it not? A. I have to look at it to see.

Q. All right. A. Well, will you find the place for me again?



*Defendants' Witness, Walter Gordon Merritt, Cross*

1261

Q. Surely (indicating). A. It seems to refer exclusively to a law reducing hours.

Q. Yes. Now at the time that that contract was made there was a Federal statute affecting hours, was there not? There was, was there not? A. Of course.

Q. There was no State statute affecting hours as far as the men were concerned at that time, is that correct?

A. Was what?

Q. So far as men were concerned?

The Court: This is in 1939?

Mr. Herwitz: 1939.

1262

The Court: The latter part of 1939?

Mr. Herwitz: The early part of 1939—February 1939.

Q. Is that correct? A. Correct.

Q. Now having in mind that the Federal Fair Labor Standards Act was then in existence, and having in mind that point of difference A refers to hour legislation or laws, I ask you again, do you not interpret the words in that memorandum "Application of existing laws" as applying only to the Federal Fair Labor Standards Act?

A. I do not care to change my answer.

Q. Well, can you point out to the Court any other law then on the books which you think could possibly have been referred to by that memorandum? A. I don't think the memorandum was intended to refer to any particular law. I think it was just a lawyer's eagerness.

1263

Q. Just a what? A. Just a lawyer's eagerness. We all know how we prepare contracts and phrases to cover everything that you do not think of.

Q. And it was that same eagerness on the part of Mr. Maguire that you now ascribe to him that caused him to say without question that the Federal Fair Labor Standards Act did not apply to the employees involved? A. No, I think he ceased to be eager for a moment when he admitted that.

1264 *Defendants' Witness, Walter Gordon Merritt, Cross*

Q. Mr. Merritt, is it a fact that when there was a discussion in 1942 about the settlement of the liability or contingent liability of the employers under the Fair Labor Standards Act that the employers offered to make a settlement which went back to the date when the Federal Government's suit was instituted? A. I think that was discussed, but the principal discussion and the actual clauses phrased were not on that basis, and I am not even sure that that was proposed. I remember it being discussed. The only proposition I have in mind, which is borne out by my minutes, is the proposition of settlement on the basis of a 25 per cent liability from the time that the Act took effect, which was in October 1938.

1265

Q. Well, do you recall that as an argument in favor of the union's acceptance of that proposal it was urged that there would be virtually a one hundred per cent payment from the time that the Government started its action in the Arsenal Building case? A. I recall a discussion to the effect that they might get money by the settlement which they would never get if it wasn't settled, because some building might go bankrupt and things might go wrong, and people might have disappeared who owned the building during the part of the period since the Act had taken effect. I don't remember any emphasis on the date as to when the suit was commenced. I know my own point of view did not work in with that at all, but I do recall that some of my clients suggested that we might drop the curtain at that time. I do not recall it assuming enough importance to become a proposal. I may be wrong about that, but I am giving you the best of my recollection.

1266

Q. Well, does the percentage, 58 per cent, refresh your recollection on that? A. What was the 58 per cent. It isn't in my papers which were drawn up in my own handwriting at the time, and it isn't in whatever notes that I had as to the conferences with Arthur Meyer, and yet I

vaguely remember 58 coming into the picture in some way. I do not recall just how.

Q. You understand I was not present? A. I understand that perfectly.

Q. Isn't it a fact, Mr. Merritt, or does this refresh your recollection if it is the fact, that rather than your settlement, your settlement offer being on a 25 per cent basis, that is, 25 per cent of—well, withdrawn. I am afraid I may not understand clearly what your 25 per cent basis is. Will you explain that to me? A. It was 50 per cent of the actual overtime that might be due, if anything were due, and 25 per cent of the total liability. It would be the actual overtime plus an equal sum for liquidated damages.

1268

Q. All right. Isn't it a fact that instead of it being 50 per cent of the actual overtime that the proposition got down to an offer of 58 per cent? A. I say I vaguely recall something to do with 58 per cent but I am totally unable in my own mind unless you refresh my recollection, to know how that percentage was arrived at and how it came into the picture.

Q. Wouldn't the 58 per cent be pretty close to the proportion of the liability before the Government's suit was commenced and after the Government's suit was commenced? A. Well, it is quite some time since I have studied arithmetic.

1269

Q. Well, I have not worked this out. Let us see whether we can. The Act went into effect— A. If you say this was—

Q. I haven't worked it out, I don't know, and I may be groping. Let us see whether it is so. The Act went into effect in October, 1938. The Government started its suit in March, 1940, so that prior to the Government's suit there were some eighteen months of liability in the event that the Supreme Court should uphold, etc., etc. So much is correct, is it not?

1270

*Defendants' Witness, Walter Gordon Merritt, Cross*

Mr. Bruce: Well, I object to the form of that question as assuming there was a liability. That is what this litigation is here for.

The Court: That is merely an assumption, isn't it?

Mr. Herwitz: At that time.

Mr. Bruce: It was not framed as an assumption.

The Court: Let us assume that it was an assumption.

Mr. Herwitz: Yes.

1271 A. Well, it would be helpful to me, if you would just state your proposition on paper.

Q. Isn't it a fact— A. I mean instead of putting it in the form of a question.

Q. Yes. A. And then if I am able to calculate fast in that connection, I will agree with you, if I can.

Q. Well, will you do it, because I haven't it. I may be entirely wrong. A. Now you tell me what you want me to do.

The Court: Do you want a pad?

The Witness: Thanks. It will be helpful.

1272

The Court: Do you want a pad, Mr. Herwitz?

Mr. Herwitz: Thank you; I have one right here.

Q. From March 1940 until February 1, 1942— A. Now I am worse off because I haven't got a pencil.

Q. Here is one, Mr. Merritt (handing). From March 1940 to February 1, 1942, was just a week or so more than 22 months. Let us call it 22 months. That was the period after the Government commenced suit; and the period before the Government commenced its suit I think accurately would be about 17 months, so the total number of months involved would be 39 months. Now I haven't figured it out, but what percentage is 22 of 39? Is it 58 per cent? I am looking to find out whether that is the answer. A. This is most cruel and unusual treatment.

Q. Well, I am trying to give it to you, Mr. Merritt?  
A. (After figuring) It seems to be 55 per cent, isn't it?

Q. It is about 55 per cent, is that about right? A.  
Yes.

Q. Now I do not know whether, if we did it exactly, whether it would come out to 58 per cent? I just asked you whether that is a fact. A. What is a fact?

Q. That the offer of the employers was— A. Was arrived at through that form of calculation?

Q. Yes. A. I do not recall, but I don't say it isn't so, and I have even forgotten that there was a definite offer of 58 per cent. 1274

Q. Mr. Merritt, when the Wage and Hour Law came into effect, did you have anybody on your staff write any legal memorandum as to its possible application to your clients? A. Meaning these two associations in the Garment Center?

Q. Yes. A. Never. We did not even think of it as deserving the dignity of a legal opinion.

Q. Was the Meyer formula your idea in the 1942 negotiation? A. Yes.

Q. Is it part of that formula, as formulated by you, that there should be no reduction in the hourly rates as the result of the application of the formula? A. Well, if I understand your question correctly, it is just foolish on its face. 1275

Q. In what respect, Mr. Merritt? A. Well, you know what the formula is, and you know it acts in a way that provides a lower hourly rate so that there will be sufficient money left over to pay time and a half overtime and arrive at the same earnings. You knew that, didn't you?

Q. Yes, I did, but I am trying to have you testify to it, Mr. Merritt. Isn't it a fact, Mr. Merritt, that in instituting and putting in the Meyer formula in 1942, you were careful to provide for a sufficiently high weekly wage increase so that the application of the formula would not



1276 *Defendants' Witness, Walter Gordon Merritt, Cross*

result in any reduction in the hourly rate of the men?

A. May I have that question again?

Q. (Question read.) A. I did not have that in mind. I will tell you what I did have in mind, if you want to know.

1277 Q. That is exactly what we want to know. A. We had in mind that we had always operated on a basis of weekly earnings. The men agreed through their union to work a definite number of hours for a specified number of dollars. In this particular situation both sides were trying to carry out exactly the same objective which they carried out in previous occasions, to arrive at a weekly pay for a specified number of hours, and in order not to change that traditional method of doing business they devised this formula so that they could go on as before, with, however, a wage increase which was first added on the weekly earnings and then this formula applied to accomplish the result of which I speak.

Q. Yes. The application of the Meyer formula results in lowering the basic hourly wage? A. Of course.

1278 Q. And isn't it a fact that a ten per cent increase was agreed to by the employers so that the increase would be sufficiently high as to not result in a reduction in the hourly wages with the application of the Meyer formula?

A. That wasn't in my mind. I do not recall that it was in anybody's mind. The whole purpose was as I have stated. We were still negotiating on the only basis that I ever knew how to negotiate, not on the basis of hourly rates, and we thereupon established the formula so that we could go on doing business just as we had done, but only with an increase in hourly wages, and I will remember the discussion of how we arrived at the ten per cent. As a matter of fact, you know that we did not arrive at it, that Arthur Meyer arrived at it, but we came pretty close to knowing what it was going to be on both sides before it was turned over to Arthur Meyer to de-

cide, and I remember using this word so many times that there seemed to be a sort of magic in the idea of ten per cent. I think it was about that time that Steel had given ten per cent, and I remember saying to my people, "If you try to say 6, 7, 8 or 9, you don't get anywhere. Ten's the word to conjure with," and as I recall it, it was that general connotation which controlled both sides—ten per cent, ten per cent was the prevailing clack in the industrial world at that time; that is my recollection.

Q. Well, have you ever studied the formula to see whether it operates in fact so that there is no hourly rate reduction from what it had previously been? A. I don't think I ever did.

1280

Q. If I tell you that is so, you will accept that?

Mr. Bruce: Your Honor, the exhibits in evidence in this case show that that is not so.

Mr. Herwitz: In what respect?

Mr. Bruce: Well, I ask you, Mr. Herwitz, and his honor, if he thinks it is of any importance, to examine paragraph 25 of the answer which sets up the so-called implied hourly rate defense.

Mr. Herwitz: Now, Mr. Bruce, you are interrupting and you are bringing in something that has absolutely no bearing except that you have demonstrated clearly exactly the point I am trying to make, that according to the implied contract that you are trying to say the parties entered into there would be an hourly reduction, but under the Meyer formula there is no hourly reduction, and that is exactly the point.

1281

Mr. Bruce: I still say you are wrong. This is calculated on the basis of the Meyer formula for 46 hours and shows a reduction.

Q. Mr. Merritt, does a rise in the cost of labor lead to a proportionate rise in the rents that a landlord can charge? A. No.

1282

*Defendants' Witness, Walter Gordon Merritt, Cross*

Q. What is that? A. No. You mean—

Q. Would you say— A. You mean as a matter of economics, because your question—

Q. Yes. A. —was put that I really shouldn't answer it so categorically. If you mean as a matter of economics that a ten per cent increase in wages means a ten per cent increase in operating costs—

Q. Yes. A. Certainly not.

Q. Not in operating costs, Mr. Merritt. That is not the question I put to you. A. Then I did not understand your question.

1283

Q. If a landlord has to pay more for his labor does that, in your experience as representing these associations, result in the landlord charging more rent for his premises and therefore making up the difference?

Mr. Bruce: Your Honor, I have been very reticent this morning. I have learned, I think, to keep quiet in the progress of the eight days, but I do rise because I fail to see any relevancy of this question. I also failed to see that it in any way is proper cross examination of this witness.

1284

The Court: I should think it is not cross examination on the subjects on which you examined Mr. Merritt.

Mr. Herwitz: Well, insofar as it is not, your Honor, I am making him my own witness.

A. It is opinion evidence, you ought to pay for it.

Q. What is that? A. It is opinion; you ought to pay for it.

Q. Well, I had the opinion before, Mr. Merritt, so I do not want to pay for it again. You have expressed an opinion on that subject, have you not? A. No, I don't think so.

Q. Haven't you— A. It doesn't sound like me.

Q. It doesn't sound like you? A. No.

Q. Well, didn't you say before the National War Labor Board panel in Washington—I hate to bring your memory back to it, Mr. Merritt—in May 1942, that the landlords could not make up increased operating costs by charging more rent because that was governed entirely by the law of supply and demand? A. I do not recall saying it.

Q. Didn't you have a witness before the panel who so testified? A. That is easily possible.

Q. Didn't Mr. Earl, one of your expert witnesses, before that panel, so testify? A. I don't recall.

Q. Is that contrary to your understanding or is it in line with your understanding? A. Now will you put your question so that I will know what you are talking about?

1286

Q. You said it was entirely possible that a witness before that panel did so testify, is that correct? A. Yes. I don't recall all the testimony put in there in those days by my various clients.

Q. Well, isn't it a fact that the question I have now put to you, Mr. Merritt, is one that frequently is raised—A. Put it definitely to me again and I will try to give you the best answer I know how.

Q. All right. Isn't it a fact that you and your clients, the real estate owners in this city, and the real estate associations that you represent, have frequently, in negotiations with the union, stated that they are unable to make up and be reimbursed and repaid for increased labor costs by charging increased rentals to their tenants because the amount of rent that you are able to charge to a tenant is governed entirely by the law of supply and demand? A. Well, I say I don't remember ever putting it in that way. We have pleaded inability to pay.

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Q. Yes? A. On many occasions we have pleaded it before the Board, and of course that clearly implies that we don't feel we are sure of recouping by increased rents

1288

*Defendants' Witness, Walter Gordon Merritt, Cross*

the extra cost to which we may be put. We spoke of the increased cost of materials, the increased cost of labor, the increased cost of this and that, as things which made it more difficult for us to operate, and I suppose that implies that we do not see our way clear of passing it on to the public in every case.

1289

Q. Well, haven't you gone further than saying that you did not see your way clear? Haven't you said that you can't pass it on to the tenant because rents are governed entirely by the law of supply and demand? A. I don't remember saying so. It doesn't sound like me, as I said before.

Q. Well, have you said that in substance— A. I don't want to quibble with you.

Q. Well, have you said that in substance? A. Well, I have said exactly what I told you a moment ago, and it seems to me that it clearly implies that we feel there are times when we cannot pass the cost on to the public. To that extent I think what you are trying to get me to say is true.

Q. Now specifically, do you remember Mr. Earl— A. I do not remember what Mr. Earl testified to down there in Washington.

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Q. Do you remember he was a witness of yours—do you not? A. I do remember that.

Q. You remember he was a witness on the question of ability to pay? A. I think that is true.

Q. And do you remember his saying that rentals are determined entirely by the law of supply and demand? A. I do not. I wouldn't be at all surprised if he did say it, but I haven't the slightest recollection.

Mr. Bruce: Your Honor, before we go any further—maybe we are not going any further—I would like to have it understood that I have an



*Defendants' Witness, Walter Gordon Merritt, Cross*

1291

automatic objection in here that you can invoke to shut off these irrelevancies at any time.

The Court: I do not think I understand what you are saying.

Mr. Bruce: Well, I merely have an objection to this line of questioning and any time that you feel you would like to sustain my objection the objection is still pending.

The Court: I do not like those general objections because sometimes I think that the lawyer lets it run along and then something he doesn't like occurs. If he wants to stand on his objection, I would rather have you object. I have no doubt what your point is.

1292

Mr. Bruce: Well, I do object if there is any further questioning on this irrelevant line.

Q. In line with the questions that I put to you before, Mr. Merritt, about the Arsenal Building becoming a signatory, will you look at these two letters and tell me whether or not they refresh your recollection on the subject (handing)? A. No, I don't think they could possibly refresh my recollection on that subject because my mind is so completely blank on that subject, but may I read the letters? They speak for themselves (examining).

1293

Q. They do not refresh your recollection? A. Well, I think I have to retreat slightly on my statement. The first one seems to stir some glimmer in the past in my mind. I haven't any doubt the letters were written. I am sure Mr. Bruce won't object to their going in evidence.

Q. No, I have no desire to have them in evidence, if you say you do not have any explanation of them because you do not recall— A. Do you want me to try and explain them?

1294

*Defendants' Witness, Walter Gordon Merritt, Cross*

Q. No, I don't, not unless you recall them.

Mr. Herwitz: That is all.

Mr. Bruce: No further questions, your Honor.

Mr. Bruce: Defendants rest for the second time, your Honor, with the renewal of the motion again for judgment on the whole case.

The Court: Decision reserved.

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**Stipulation re Exhibits.**

1297

**UNITED STATES CIRCUIT COURT OF APPEALS,****FOR THE SECOND CIRCUIT.**

**MEYER GREENBERG**, suing in behalf of  
himself, and other employees and  
former employees of defendants  
similarly situated,

**Plaintiff-Appellee-Appellant,**

**against**

**ARSENAL BUILDING CORPORATION and**  
**SPEAR & Co., Inc.,**  
**Defendants-Appellants.**

1298

It IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the plaintiff's exhibits numbered 3, 7, 8, 9, 10, 11, 14, 16 and 17, and defendants' exhibits numbered A, B, C, D, E, F, H, I, L and M, shall be omitted from the transcript of record on appeal but shall be deemed to be included as part of the record on appeal, with the same force and effect as if set forth in full in said transcript of record on appeal, and that three copies of each exhibit specified above shall be handed up to the Circuit Court of Appeals.

1299

**Dated: New York, N. Y., February 3, 1944.**

**VICTOR J. HERWITZ,**

**Attorney for Plaintiff-Appellee-Appellant.**

**McLANAHAN, MERRITT, INGRAHAM &  
CHRISTY,**

**Attorneys for Defendants-Appellants and  
Kenneth C. Newman.**

1300

## Plaintiff's Exhibit 1.

*Stipulation as to Certain Facts.*DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

\* In order to shorten and facilitate the trial of this action,

1301 IT IS STIPULATED AND AGREED by and between the attorneys for the respective parties, as follows:

1. That this action is discontinued without costs as against the defendant Arsenal Annex Corporation.

1302 2. That upon the filing herein of written powers of attorney, duly executed and acknowledged by said persons, authorizing plaintiff, Meyer Greenberg, to institute and maintain this action in their behalf, plaintiff shall be deemed so authorized by the following present and former employees of the defendant Arsenal Building Corporation: George W. Silvera, Harry B. Simon, Santiago Balara, Jerry Suarez, Phillip Haberman, Julio Roque Del Valle, Michael Cassar, Joseph A. Costa, John Cassar, Jose Garcia, Anthony Cali Lo Spesa, Harry Blum, Clarence Bryant, Eli Davis, Jose Martinez, Jose L. Garcia, Arthur Lipsman, August Gangi, Charles Anderson, V. James Catone, Manuel Longueira, Manuel Veiga, Raymond Ramo, Julius Falcheck and Andrew Martinez.

3. That plaintiff, Meyer Greenberg, at all the times mentioned in the complaint was engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (herein called "the Act").

4. That if the Court finds on the whole case that plaintiff, Meyer Greenberg, is entitled to recover, then he and

*Plaintiff's Exhibit 1*

1303

the other employees named in paragraph "2" of this stipulation shall recover against Arsenal Building Corporation, on the basis of the amounts set forth in Schedule "A" annexed hereto, exclusive of any additional amounts which the Court may award as liquidated damages, attorney's fees, or costs, and less deductions for Social Security Tax and the so-called "Victory Tax," if such deductions are required by law. The amounts appearing in Schedule "A" annexed hereto are the amounts found to be due said employees for overtime under Section 7 (a) of the Act between October 24, 1938, and February 5, 1942, by the Wage and Hour Division of the United States Department of Labor.

1304

5. That the collective bargaining agreements alleged in paragraph "8" of defendants' answer were made by Locals 32-B, 164 and 32-J of the Building Service Employees' International Union on behalf of the members of said local Unions, and were in effect throughout the period covered by the complaint.

6. Plaintiff, Meyer Greenberg, and the other employees named in paragraph "2" of this stipulation, were members of said Local 32-B throughout the period covered by the complaint.

1305

7. That the defendant, Arsenal Building Corporation, was a party to, and No. 463 Seventh Avenue, otherwise known as the Arsenal Building, was a signatory building under, said collective bargaining agreements throughout the period covered by the complaint.

8. That plaintiff, Meyer Greenberg, and the other employees named in paragraph "2" of this stipulation, were employed and paid in accordance with said collective bargaining agreements.

9. That plaintiff, Meyer Greenberg, in particular, was employed for and actually worked during the following periods on the following basis:



1306

*Plaintiff's Exhibit 1*

October 24, 1938 to February 2, 1939 per week for a 48-hour week	\$27.75
February 3, 1939 to August 1, 1940 per week for a 47-hour week	\$28.75
August 2, 1940 to February 5, 1942 per week for a 46-hour week	\$29.33

10. That the defendants hereby withdraw the Sixth and Partial Defense (Pars. 31 and 32) from their answer.

Dated: New York, N. Y., February 8, 1943.

1307

VICTOR J. HERWITZ

Attorney for Plaintiff

McL. M. I. &amp; C.

Attorneys for Defendants

*Schedule "A"*

(Amount found to be due employees for overtime under Section 7 [a] of the Act between October 24, 1938 and February 5, 1942, by the Wage and Hour Division of the United States Department of Labor.)

1308

## Employee

Amount (Exclusive of Liquidated Damages, Attorneys' Fees and Costs and Before Deductions for Social Security and Victory Taxes).

Meyer Greenberg	\$184.00
George W. Silvera	210.84
Harry B. Simon	208.45
Santiago Balara	35.10
Jerfy Suarez	35.98

## Plaintiff's Exhibit 1

1309

Phillip Haberman	178.49
Julio Roque Del Valle	183.23
Michael Cassar	200.34
Joseph A. Costa	195.50
John Cassar	174.86
Jose Garcia	197.79
Anthony Cali Lo Spesa	94.36
Harry Blum	193.69
Clarence Bryant	205.46
Eli Davis	227.52
Jose Martinez	219.80
Jose L. Garcia	165.80
Arthur Lipsman	201.78
August Gangi	164.96
Charles Anderson	234.32
V. James Catone	207.42
Mannuel Longueira	655.55
Manuel Veiga	179.93
Raymond Ramo	659.30
Julius Falcheck	74.74
Andrew Martinez	93.87

1310

1311

1312

**Plaintiff's Exhibit 4.*****Management Contract Between Owner and Spear & Co.,  
as Agent.***

This Agreement, made this twenty-third day of January, 1928, between Seventh Ave. & 35th St. Corporation, a domestic corporation hereinafter termed the Owner, and Spear & Co., Inc., a domestic corporation, hereinafter termed Agent, witnesseth

1313

Whereas the Owner is seized of the property known as No. 463-467 Seventh Avenue in the Borough of Manhattan, City of New York, and

Whereas the Agent is engaged in the management of Real Estate and general Real Estate brokerage business in the City of New York; and,

Whereas the Owner is desirous of engaging the services of the Agent as sole agent in the manner and upon the terms hereinafter set forth;

Now therefore in consideration of the premises and the sum of One (\$1.00) Dollar, the receipt of which is hereby acknowledged, and other good and valuable considerations, the parties hereto have agreed as follows:

1314

First. The Owner does hereby employ and retain the Agent as sole agent for and in connection with the aforesaid property for the term beginning the first day of February, 1928, and to end on the thirty-first day of January, 1929.

Second. It is further understood and agreed that all applications for space in the said building are to be referred to the Agent, it being the intention that all leases and other arrangements for occupancy in the said building or portions thereof, shall be referred to and closed by the Agent, the Owner hereby conferring the necessary authority to Agent for the purposes aforesaid, and the Agent shall receive a stipulated commission therefor, as hereinafter set forth.

Third. The Owner agrees to pay the Agent the usual and customary commission in vogue at the time of making leases for space in said building as promulgated by

*Plaintiff's Exhibit 4*

1315

the Real Estate Board of New York; if a lease be made by a broker other than the Agent, then this broker shall be compensated out of the commission, as above set forth, as and when the same is received by the Agent, and no additional charge shall be made by the Agent to the Owner.

Fifth. It is agreed that all commissions that become due hereunder to the Agent, shall in each instance be paid when the leases have been executed.

Seventh. It is further understood and agreed that the Agent shall employ the necessary help, make all necessary purchases, advertise when necessary, contract for and make necessary repairs and the payment therefor, and pay, for all expenses in relation to the operation and maintenance of the building for the account of the Owner, such expenses to be deducted monthly and vouchers therefor shall accompany each monthly statement.

Eighth. The Agent is hereby authorized to take any action at law or equity which it should deem necessary or appropriate for the purpose of enforcing collection of money due from tenants or to repossess any portion of the premises which may be necessary or convenient for the management thereof.

Twelfth. The Owner further agrees to pay the Agent the sum of Ten thousand (10,000) Dollars per annum, payable in monthly installments which shall be deducted each month; a statement shall be rendered by the Agent to the Owner, which shall show all income and disbursements, and a check for the balance shall be submitted by the Agent to the Owner; for the aforesaid charge the Agent hereby agrees to collect the rent and otherwise generally manage the property.

This agreement shall bind and benefit the personal representatives, successors, and assigns of the parties.

1318

*Plaintiff's Exhibit 4*

In Witness Whereof, the parties hereto have executed, or caused to be executed, these presents by the properly authorized parties and the appropriate seals thereto duly affixed, the day and year first above written.

SPEAR & CO., INC.,

By AARON RABINOWITZ,

*Pres.*

SEVENTH AVE. & 35TH ST. CORPORATION,

By HARRY H. GREENBURG,

*Tres.*

1319

Witness:

\_\_\_\_\_  
*As to Owner.*

\_\_\_\_\_  
*As to Agent.*

No. 463-7 Seventh Avenue. Seventh Ave. & 35th St. Corp., owner. Agency Contract. Begins February 1st, 1928. Expires January 31st, 1929. Spear & Co., Real Estate, 1261 Broadway, New York City.

1320



## Plaintiff's Exhibit 5.

1321

## PROPOSED REVISION TO PROVISION "6"

of

## PROPOSALS

of

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32-B

to

MIDTOWN REALTY OWNERS' ASSOCIATION, INC.

1322

and

PENN ZONE ASSOCIATION, INC.

Dated: New York, N. Y. December 17th, 1938.

That provision "6" be eliminated and the following provision inserted in lieu thereof:

6. Forty (40) hours shall constitute a week's work for all employees covered by this agreement (excepting watchmen and charwomen), which time shall include two twenty minute relief periods each day for elevator operators and starters, but shall exclude luncheon recess which shall not exceed one hour.

1323

A working day shall not exceed eight (8) hours. Except for required relief periods and said luncheon recess, hours of work in each day shall be continuous, and no man shall be required to take a relief period or time off in any day in excess of required relief periods and said luncheon recess, without having such excess relief period or time off charged as working time. The hours of regular full time employees shall continue on a full time basis.

1324

*Plaintiff's Exhibit 5*

All time worked in excess of said eight (8) hours per day and forty (40) hours per week shall be paid for at the rate of time and one half, in cash. Each employee shall have two full days off in every seven (7) days.

All employees required to report to work for part of a normal day after the expiration of forty hours work by him in any week shall be paid a full day's pay for such extra time and at the rate of time and one half.

All employees shall be granted, in each year, ten (10) days' sick leave with pay.

1325

**Plaintiff's Exhibit 12.**

Copy of Letter dated July 31, 1942 addressed to Spear & Co., Inc., from Victor J. Herwitz.

(Printed herein at pages 210-211.)

**Plaintiff's Exhibit 13.**

1326 Memorandum In Support of Points Urged by Local 32 B. Point of Difference "A."

(Printed herein at pages 257-258.)

**Plaintiff's Exhibit 18.**

Proposal Entitled GARMENT CENTER NEGOTIATIONS.

(Printed herein at pages 308-309.)

## Defendants' Exhibit G.

1327

*Article From "Building Service" for February, 1939.*

## THE PRESIDENT'S PAGE

## ARBITRATOR McGRADY'S SUPPLEMENTAL AWARD

Elsewhere in this issue is printed a summary of a series of distinct gains made by Local 32B in connection with the Garment Center and Pennzone agreements. In addition to the dollar increase and the immediate reduction of one hour per week with a further reduction in eighteen months, there are a number of other vital improvements contained in the new contract.

1328

The union's drive to eliminate the fee charging employment bureaus of Sixth Avenue is at last successful. Employees are no longer compelled to pay any fees whatsoever to any employment agency. This has been the goal of Local 32B from its inception in April, 1934.

The union has secured the recognition of the principle of seniority in promotions and the filling of vacancies, in addition to greatly improved vacation schedules as a reward for length of service, one week's notice in the event of layoff or in lieu thereof a week's pay. Rotation of Sunday and holiday work for all employees as a means of eliminating discrimination is another vital link made in this chain of gains. In the event of any wage or hour law, the union is protected by carrying the matter before the Honorable Edward F. McGrady at any time the question arises. Reduction of the permissible work day from ten to 9 1/2 hours with overtime being paid to those who work beyond that period, is another substantial gain in this contract.

1329

32B's distinction lies in the fact that from its very inception we have gone forward with each strike and arbitration award. Sometimes these steps forward have been nominal ones, but nevertheless progressive in every respect. This is another distinct and substantial forward stride in our union's history. This time we have gained a number of improvements.

1330

*Defendants' Exhibit G*

Starting on April 19, 1934 with no scale or hour schedule whatsoever and with no protection of any kind we have gone forward one step at a time until today our organization stands as one of the foremost labor unions of the United States in regards to greatly improved conditions for the welfare of our members.

1331

Like any big and powerful organization we have our disagreements at times and express them very definitely, but every fair-minded man in Local 32B very proudly proclaims to the entire world that, step by step, we have fought every inch of the way from the beginning of our organization until today Local 32B stands foremost amongst the great labor unions of the United States. In point of substantial benefits gained for its members and the prestige of its magnificent history, our organization stands four-square as a warning against reactionary interests who would dare try to bring back the starvation wages and long hours that existed prior to the institution of Local 32B. We have made another step forward and it is incumbent upon each and every one of us to solidify these gains and prepare for the future.

1332

### ARBITRATOR McGRADY MAKES SUPPLEMENTARY AWARD

On February 4, 1939, Mayor Fiorello H. LaGuardia appointed the Honorable Edward F. McGrady, former Assistant Secretary of Labor of the United States, to arbitrate the points of dispute which existed between Local 32B and the Midtown and Penn Zone Realty associations, representing buildings in the garment, fur and millinery areas of New York City.

On February 21st, 1939, Arbitrator McGrady rendered his decision after numerous hearings, submissions of evi-

*Defendants' Exhibit G*

1333

dence and personal appearances of the officers of the Union and members of the employers' associations.

It must be borne in mind that the gains contained in the decision of Arbitrator McGrady are in addition to the old contract which stands in all respects except where improved by the terms of the present arbitration award.

The following summary tells the story at a glance:

**1. WAGE RATES**

(1) A flat increase of one dollar for each and every employee, covered by the agreement, but in no case shall any employee be paid less than the following minimums.

1334

Class C buildings

\$24.00 per week

Class B buildings

\$25.75 per week

Class A buildings

\$27.75 per week

Contract calls for reopening as to wages in August, 1940.

1335

**2. WORKING TIME**

Hours to be reduced to forty-seven (47) per week and a further reduction to forty-six (46) in August, 1940.

Watchmen's hours to be reduced to 59 per week and a further reduction to 58 in August, 1940.

**3. EMPLOYERS MUST PAY AGENCY FEES**

Employer agrees to use the union's free employment bureau to the fullest extent, and further agrees that where a man is engaged through a fee charging agency the em-



1336

*Defendants' Exhibit G*

ployer shall pay the full amount of the fee. This eliminates for all time the vicious practice of men being compelled to pay for their job.

#### 4. SENIORITY RIGHTS

Promotion from within ranks.

1337

Preference shall be given to those already being employed in the buildings in filling vacancies and where new positions are being created. Such promotion shall be based primarily on seniority with training, ability and general efficiency as considerations.

#### 5. ONLY 32B MEMBERS MAY BE EMPLOYED

The new agreement specifically states that the Employer "SHALL AT ALL TIMES EMPLOY NONE BUT MEMBERS IN GOOD STANDING OF THE SAID UNION IN THE VARIOUS OCCUPATIONS OVER WHICH SAID UNION NOW HAS JURISDICTION."

#### 6. VACATION PROVISIONS

1338

a. A very substantial victory has been secured in relation to vacation period as a reward for length of service. The following language is taken verbatim from the contract "EVERY EMPLOYEE EMPLOYED BY HIS EMPLOYER WITH SUBSTANTIAL CONTINUITY FOR ONE YEAR SHALL RECEIVE AT LEAST ONE CONTINUOUS WEEK'S VACATION, WITH PAY, EACH YEAR. EACH OF SUCH EMPLOYEES WHO HAS BEEN EMPLOYED FOR MORE THAN FOUR (4) YEARS SHALL RECEIVE ADDITIONALLY, ONE DAY'S VACATION FOR EACH YEAR OF EMPLOYMENT IN EXCESS OF FOUR (4) YEARS, NOT TO EXCEED, HOWEVER, A TOTAL VACATION OF TEN (10) DAYS."

*Defendants' Exhibit G*

1339

**b. PART TIME WORKERS**

Part time workers regularly employed shall receive a proportionate vacation allowance equal to the average number of days a week they are employed.

**c. FIREMEN**

Firemen are also protected in the following language taken right from the contract. "FIREMEN WHO HAVE WORKED SUBSTANTIALLY THE FIRING SEASON WHEN LAID OFF SHALL BE PAID AT LEAST THREE (3) DAYS WAGES IN LIEU OF A VACATION."

1340

**7. UNION INSIGNIA**

Employees may wear, while on duty, their union insignia.

**8. ONE WEEK'S NOTICE OF LAY-OFF**

In case of layoff our members are protected by getting either one week's notice or one week's pay. This is a radical improvement in union contracts. The following is the exact language of the agreement. "IN REDUCING FORCE EMPLOYERS ARE REQUIRED TO GIVE EMPLOYEES WHO HAVE BEEN EMPLOYED FOR ONE YEAR AT LEAST ONE (1) WEEK'S NOTICE OF LAYOFF, OR IN LIEU THEREOF AN ADDITIONAL WEEK'S PAY. IN THE EVENT OF SUCH LAYOFF OR DISCHARGE, VACATION CREDITS ARE ALSO TO BE ALLOWED TO THE EMPLOYEE."

1341

1342

*Defendants' Exhibit G***9. TIME OFF ON ELECTION DAY**

In addition to the regular holidays all employees will be allowed at least two hours off on Election Day without loss of pay therefor.

**10. ROTATION OF SUNDAY AND HOLIDAY WORK**

1343

**"SCHEDULES SHALL BE ARRANGED SO THAT ALL EMPLOYEES SHALL ROTATE ON SUNDAY AND HOLIDAY WORK, SO FAR AS PRACTICAL."**

The purpose of the foregoing is intended to eliminate, as far as it is humanly possible any form of discrimination.

**11. ADEQUATE SANITARY ARRANGEMENTS FOR EMPLOYEES**

**"ADEQUATE SANITARY ARRANGEMENTS FOR EMPLOYEES SHALL BE MAINTAINED FOR EMPLOYEES IN EVERY BUILDING."**

**12. WAGE AND HOUR LEGISLATION**

1344

As a protection for the union in the event of any wage and hour legislation the union is permitted, according to the terms of the contract, to present the entire question to Mr. McGrady if and when such wage and hour legislation ever applies to the building-service industry.

**13. LIMITATION OF WORKING DAY**

According to the old contract the employer was allowed a work day of ten hours provided he did not exceed a total of forty-eight (48) in one week. The arbitrator cut that down thirty (30) minutes a day in the following language.

**"A WORKING DAY SHALL NOT EXCEED NINE AND ONE-HALF (9 1/2) HOURS."**

He further clarifies this very vital point as follows:

"ALL TIME WORKED IN EXCESS OF NINE AND ONE-HALF ( 9 1/2) PER DAY OR FORTY-SEVEN (47) AND FORTY-SIX (46) HOURS PER WEEK IN THE APPLICABLE PERIOD SHALL BE PAID FOR IN CASH AT THE RATE OF TIME AND ONE-HALF."

This means, in effect, that any man who works past nine and one-half (9 1/2) hours per day (excluding watchmen on whose overtime there is no change) exclusive of his lunch time shall be paid additional overtime for that day. This is a very substantial victory.

1346

One of the most important gains achieved through the decision of Arbitrator McGrady is the fact that all overtime, whether it is incurred at the expiration of the work week or at the expiration of the working day must be paid for IN CASH. The only occasion on which the employer may give corresponding time off is on holidays.

#### 14. PROTECTION FOR SHOP STEWARDS

The following language has been written into and made a binding part of the new agreement: "THERE SHALL BE NO DISCRIMINATION AGAINST SHOP STEWARDS OR AGAINST ANY OTHER EMPLOYEES."

1347

#### 15. DATE OF AGREEMENT

By decision of Arbitrator Edward F. McGrady the agreement takes effect on February 4, 1939 and shall continue up to and including February 3, 1942.

Summarizing the negotiations and final decision of Mr. McGrady which was handed down on Tuesday, February 21st, 1939 at 6 P. M. the paramount thought you must keep in mind is that every one of the foregoing points

1348

*Defendants' Exhibit G*

was secured over and above those in your old contract. All the points of your old agreement are retained and the above points are additional gains for our membership.

Every one of the above points are clearly explained for the benefit of shop stewards and also the entire membership. If there is the slightest doubt as to any one particular point or points members are requested to consult either their local council chairman or the officers of the union at General Headquarters, 570 Seventh Avenue.

1349

THOMAS YOUNG,  
*Recording Secretary.*

1350



December 2nd, 1941.

PORTIONS OF DEMANDS MADE BY THE UNION  
(LOCAL 32-B) THROUGH THE WAGE SCALE  
COMMITTEE FOR REVISION AND AMENDMENT  
OF THE McGRADY AGREEMENT TO BECOME  
EFFECTIVE FEBRUARY 4th, 1942:

During the period of this agreement, there shall be no reduction in wages, nor an increase in hours.

In the event that during the period hereof, any law is established or legislation enacted, requiring a reduction in hours below those provided for herein, no employee shall suffer any decrease in the weekly wage provided for herein. In the event that the said hours are so increased, any employee so affected shall immediately receive a commensurate increase in his weekly wage.

1352

#### HOURS

Provision "4" shall be eliminated and the following provision inserted in its place:

4. Effective as of February 4th, 1942, the regular work week for all employees covered by this agreement shall not exceed 5 days per week nor more than 40 hours, which time shall include two thirty (30) minute relief periods each day for elevator operators and starters but shall exclude a daily luncheon recess for all employees which shall not exceed one hour and which shall be given at the middle of each employee's working day.

1353

5. Watchmen shall work no more than 5 days in any week and no more than 40 hours per week. A working day shall not exceed 8 hours, which time shall include one hour for luncheon which may, at the option of the watchman, be consumed outside of the building.

1354

**Defendants' Exhibit K.**

*Article From "Building Service" for October, 1939.*

**THE PRESIDENT'S PAGE****THE WAGE AND HOUR ACT**

1355

The officers of the Union and the Joint Executive Board are investigating the interpretation of the Wage and Hour Act as it applies to Building Service Employees. A number of conflicting opinions have already been given insofar as the application of the Act concerns Building Service Employees.

In order to avoid confusion a thorough check-up shall be made, not only by the officers of the Union but also by our Legal Department. When this investigation is completed the members of our Organization will be apprised of the official action necessary to be taken by the Union.

By following this procedure, confusion will be avoided and the best interests of Local 32B will be served.

1356

**Defendants' Exhibit O.**

1357

The undersigned presently employed at No. 463 7th Avenue, Borough of Manhattan, City of New York, hereby retain VICTOR J. HERWITZ as their attorney, to prosecute, adjust, settle or compromise in their behalf their claim for back wages arising under the Fair Labor Standards Act of 1938, popularly known as the Wage and Hour Law, for the period from October 24, 1938, against the owner or owners of the building known as 463 7th Ave., Borough of Manhattan, City of New York.

The undersigned also further authorize VICTOR J. HERWITZ to take any and all steps which may in his judgment be necessary or desirable for the prosecution, adjustment or compromise of the above claim.

1358

In consideration of the services rendered and to be rendered, by the said VICTOR J. HERWITZ, we, the undersigned, agree to pay the said VICTOR J. HERWITZ, as compensation Fifteen Percent of any monies which may be recovered by him as a result of his efforts, against which is to be credited any attorney's fees which may be awarded by any court and paid by the owners of the building.

Dated: New York, N. Y.  
30th day of July, 1942.

MEYER GREENBERG  
PHILLIP HABERMAN  
JULIO ROQUE DEL VALLE  
MICHAEL CASSAR  
JOHN CASSAR  
JOE COSTA  
JOSE GARCIA  
ANTHONY LO SPESA formerly employed  
HARRY BLUM  
CLARENCE BRYANT  
ELI DAVIS

1359

1360

**Amended Judgment Appealed From.****IN THE****DISTRICT COURT OF THE UNITED STATES,****FOR THE SOUTHERN DISTRICT OF NEW YORK.****[SAME TITLE.]**

1361

The issues in the above entitled action having been regularly brought on for trial before Honorable Henry W. Goddard, District Judge, at a term of this Court appointed to be held for the trial of civil cases on February 8th, 9th, 10th, 11th, 15th, 16th, 17th, 18th and 19th, 1943, and the parties hereto having appeared by counsel, and the issues herein having been duly tried upon the proofs submitted on behalf of the respective parties, and the Court having duly rendered its decision and made its findings of fact and conclusions of law directing that judgment be entered in favor of plaintiff in the sum of \$10,759.16, and the costs and disbursements of plaintiff being duly taxed in the sum of \$31.50,

1362

Now, on motion of Victor J. Herwitz, Esq., attorney for plaintiff, it is

ADJUDGED that plaintiff recover of defendants in his own behalf and as representative in behalf of each of the individuals below enumerated the following amounts, respectively (less deductions for Social Security tax and Victory tax, if such deductions are required by law):

## Amended Judgment Appealed From

1363

	Unpaid Overtime	Liquidated Damages	Total	
Meyer Greenberg	\$184.00	\$184.00	\$368.00	
George W. Silvera	210.84	210.84	421.68	
Harry B. Simon	208.45	208.45	416.90	
Santiago Balara	35.10	35.10	70.20	
Jerry Suarez	35.98	35.98	71.96	
Phillip Haberman	178.49	178.49	356.98	
Julio Roque Del Valle	183.23	183.23	366.46	
Michael Cassar	200.34	200.34	400.68	
Joseph A. Costa	195.50	195.50	391.00	1364
John Cassar	174.86	174.86	349.72	
Jose Garcia	197.79	197.79	395.58	
Anthony Cali Lo Spesa	94.36	94.36	188.72	
Harry Blum	193.69	193.69	387.38	
Clarence Bryant	205.46	205.46	410.92	
Eli Davis	227.52	227.52	455.04	
Jose Martinez	219.80	219.80	439.60	
Jose L. Garcia	165.80	165.80	331.60	
Arthur Lipsman	201.78	201.78	402.56	
August Gangi	164.96	164.96	329.92	
Charles Anderson	234.32	234.32	468.64	
V. James Catone	207.42	207.42	414.84	
Maquell Longeira	655.55	655.55	1,311.10	1365
Manuel Veiga	179.93	179.93	359.86	
Raymond Ramo	659.30	659.30	1,318.60	
Julius Falcheck	71.74	71.74	143.48	
Andrew Martinez	93.87	93.87	187.74	

---

 \$10,759.16

 Together with interest from June 15, 1940, in  
 the total sum of

2,151.80

 (representing averaged interest upon \$10,759.16  
 for the period October 24th, 1938, through  
 February 5, 1942)

---

 \$12,910.96



1366

*Amended Judgment Appealed From*

and it is further

ADJUDGED that plaintiff recover of defendants the sum of \$750.00 as an attorney's fees; and it is further

ADJUDGED that plaintiff recover of defendants the sum of \$31.50 costs and disbursements as taxed; and it is further.

ADJUDGED that plaintiff have execution therefor.

October 25th, 1943.

1367

Approved:

HENRY W. GODDARD  
United States District Judge

Judgment rendered: .

GEORGE J. H. FOLLMER

Clerk of the United States District  
Court for the Southern District of  
New York.

October 26th 1943.

1368

Amended by Order of Goddard, J., filed February 5,  
1944 nunc pro tunc.

## Notice of Motion.

1369

## UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Victor J. Herwitz, Esq., sworn to the 24th day of December, 1943, and upon the annexed copy of the judgment herein entered and filed in the office of the Clerk of this Court on the 26th day of October, 1943; the undersigned will move the United States District Court for the Southern District of New York, in Room 506 of the United States Courthouse, Foley Square, Borough of Manhattan, City, County and State of New York, on Friday, December 31, 1943, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order directing the Clerk to add to the amount of the judgment rendered in the above action average interest on moneys awarded to plaintiff in his own behalf and as agent and representative of other employees and former employees of defendants similarly situated for unpaid overtime compensation, and an additional equal amount as liquidated damages, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, from the time such moneys were due but unpaid until the date of the entry of judgment. The amount sought to be added as interest upon this motion is the sum of \$2,151.80. 1370

PLEASE TAKE FURTHER NOTICE that upon the annexed affidavit and upon the annexed copy of the judgment above referred to, the undersigned will move at the same time and place for an order directing the Clerk to add to the amount of disbursements for which judgment is rendered in the above action, the sum of \$60.00, representing one- 1371

1372

*Notice of Motion*

half of the official court reporter's minimum per diem charge for attendance at the trial of the action.

Dated New York, N. Y., December 24, 1943.

VICTOR J. HERWITZ

Attorney for Plaintiff

521 Fifth Avenue

New York, N. Y.

To:

MCLANAHAN, MERRITT, INGRAHAM & CHRISTY, ESQS.

Attorneys for Defendant

40 Wall Street

New York, N. Y.

1373

*Affidavit of Victor J. Herwitz, Sworn to December 24, 1943, in Support of Motion.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1374

[SAME TITLE.]

State of New York,

City and County of New York, ss:

VICTOR J. HERWITZ, being duly sworn, deposes and says:

He is the attorney for plaintiff in the above entitled action and is familiar with the facts in the action, being in charge of it.

The action was one for back wages under the Fair Labor Standards Act of 1938, popularly known as the 'Wage and Hour Law, together with an additional equal amount as liquidated damages, a reasonable attorney's fee and costs of the action, pursuant to Section 16 (b) of the Fair

*Notice of Motion*

1375

Labor Standards Act. The case was tried by the Honorable Henry W. Goddard of this Court without a jury on February 8, 1943, February 9, 1943, February 10, 1943, February 11, 1943, February 15, 1943, February 16, 1943, and February 17, 1943, and the oral argument occurred on February 18, 1943 and February 19, 1943, and judgment directed to be entered in favor of plaintiff, in his own behalf and as representative of other employees and former employees of defendants similarly situated, in the total sum of \$10,759.16, representing unpaid overtime compensation and liquidated damages, pursuant to Section 16 (b) of the Act.

1376

On October 22, 1943, after due notice to attorneys for defendants, costs and disbursements were taxed in the action in the office of the Clerk of this Court in the sum of \$31.50, as indicated in the annexed copy of plaintiff's bill of costs. As also indicated in the bill of costs, the Clerk struck entirely from the disbursements taxed, over the objection of plaintiff, the sum of \$306.15 sought to be taxed as stenographic fees upon the trial. Judgment was approved by the Court on October 25, 1943 and entered by the Clerk of the Court on October 26, 1943, in the form annexed.

It is respectfully submitted that the Clerk was in error in striking from taxation of disbursements the entire item representing stenographic charges by the official court reporter; and that there should have been taxed as disbursements that portion of the sum referred to, representing the official reporter's minimum per diem charges to plaintiff for attendance at the trial. The total minimum per diem charges for this purpose were \$120.00 and the one-half of this sum billed to plaintiff should have been included in the judgment as a taxable disbursements. This the Clerk erroneously failed to permit. The judgment should now be corrected to add in the taxable disbursements awarded plaintiff the sum of \$60.00 accordingly.

1377

1378

*Notice of Motion*

1379

Due to the inadvertence, the Clerk also failed to include in the amount of judgment interest upon the amount of \$10,769.16 recovered as unpaid overtime compensation and liquidated damages. Interest was omitted from the judgment as finally entered, although deponent believes, after studying the applicable authorities and the provisions of Section 480 of the Civil Practice Act of the State of New York, that such interest should as a matter of law have been included in the amount of the judgment as entered by the Clerk. These authorities indicate that interest due under the law may be readily computed without prejudice to defendants by figuring it at the legal rate as average interest from the mid-point in the period of employment for which recovery was granted in this action. This period is October 24, 1938 through February 5, 1942 and the mid-point date from which full interest should be computed is June 15, 1940. To the best of deponent's information and belief, the amount of interest computed upon a reasonable basis approximates the sum of \$2,151.80 which, deponent submits, should be ordered included within the amount of the judgment, representing average interest upon the amounts recovered as unpaid overtime compensation and liquidated damages down to the date of entry of judgment, October 26, 1943.

1380

In view of the above, this motion has been brought on for the purpose of determining plaintiff's rights in the premises and obtaining the correction of the judgment roll accordingly.

SWORN to before me this

24th day of December, 1943.

VICTOR J. HERWITZ



**Memorandum by Goddard, D. J., on Motion to Amend Judgment.** 1381

**UNITED STATES DISTRICT COURT,**

**SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE.]

*Memorandum*

GODDARD, District Judge:

The plaintiff was entitled, as a matter of law, to have had interest included in his judgment. *Peter Rigopoulos, et al., v. Jack R. Kervan, etc.*, Civil 18-373, as yet unreported decision of Judge Leibell, Southern District of New York, November 29, 1943 and cases therein cited. 1382

The omission to include interest in the judgment is a clerical error which may now be corrected by the court under Rule 60 (a) F.R.C.P. See also *Parker v. New England Oil Corp.*, 15 Fed. (2nd) 236.

In respect to the taxing of the \$60 for the attendance of the court stenographer—this motion is in substance a motion to review the refusal of the clerk to tax it; and under Rule 54(d) F.R.C.P., such a motion must be made within five days after the action of the clerk. Moreover, it appears that the plaintiff has neither paid nor been charged for such service. 1383

The motion to correct plaintiff's judgment by adding the interest of \$2,151.80 is granted. In other respects the motion is denied.

Settle order on notice.

January 18, 1944

**HENRY W. GODDARD**  
United States District Judge

ENDORSED:

U. S. District Court  
Filed: Jan. 19, 1944  
S. D. of N. Y.

1384

**Order Amending Judgment Appealed From.****UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****[SAME TITLE]**

1385

This cause having come on to be heard on December 31, 1943, on motion of plaintiff pursuant to Rule 60 (a) of the Federal Rules of Civil Procedure, to amend and correct the judgment heretofore entered and filed in the office of the Clerk of this Court in the above entitled action on October 26, 1943 to add to the amount of the judgment rendered average interest upon the unpaid overtime compensation and liquidated damages recovered in the judgment, as a clerical oversight or omission, and to add to the judgment as a taxable cost or disbursement the sum of \$60.00 for attendance of the official court stenographer; and the Court having considered the pleadings and papers on file in the action and the affidavit of Victor J. Herwitz in support of the motion, sworn to December 24, 1943, and having heard oral argument, and due deliberation having been had, and the Court having filed its opinion on January 19, 1944, it is now

1386

ORDERED, ADJUDGED AND DECREED that the motion of plaintiff to amend and correct the judgment entered and filed in this action October 26, 1943 to add interest in the sum of \$2,151.80 to the amount of the judgment is hereby granted, and the motion to add \$60.00 as a taxable cost or disbursement for attendance of the official court stenographer is hereby denied, and it is further

ORDERED, ADJUDGED AND DECREED that the judgment entered and filed October 26, 1943, be and the same hereby is amended and corrected nunc pro tunc to correct a clerical oversight or omission, so as to add the words "together with interest from June 15, 1940 in the total

*Order Amending Judgment Appealed From*

1387

sum of \$2,151.80 (representing average interest upon \$10,759.16 for the period October 24, 1938 through February 5, 1942)" in the judgment, to be inserted after the figure "\$10,759.16" making a total of \$12,910.96 on the second page of the judgment, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants' notice of appeal dated November 4, 1943, and the plaintiff's notice of cross-appeal dated November 18, 1943, be and the same hereby are deemed to relate to the judgment as so amended and corrected and to this order.

1388

Dated New York, N. Y., February 5, 1944.

HENRY W. GODDARD  
U. S. D. J.

1389

1390

Opinion by Goddard, D. J.

## UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

VICTOR J. HERWITZ, Attorney for Plaintiff by James L. Goldwater; Emanuel Bund, of Counsel.

1391 McLANAHAN, MERRITT, INGRAHAM & CHRISTY, KENNETH C. NEWMAN, Attorneys for Defendants by Robert R. Bruce, John J. Boyle, Richard Swan Buelk, of Counsel.

GODDARD, District Judge:

1392 Plaintiff sues on behalf of himself and twenty-five other employees or former employees of the Arsenal Building, to recover unpaid overtime compensation, alleged to be due under Section 7(a) of the Fair Labor Standards Act of 1938 for varying periods of employment from October 23, 1938, to February 5, 1942. Plaintiff also seeks to recover under Section 16(b) of the Act an additional equal amount as liquidated damages and an attorney's fee. The defendant, Arsenal Building Corporation, is the owner of the twenty-two story loft building located at the corner of Seventh Avenue and Thirty-fifth Street, New York City known as the "Arsenal Building." The defendant, Spear & Co., Inc., manages and operates the building for the owner. By stipulation of the parties, the action has been discontinued as against defendant, Arsenal Annex Corporation.

Jurisdiction of the court rests upon Section 41(8), 28 U. S. C. A. (Judicial Code, §24) and Section 16(b) of the Act.

Various defenses have been interposed by defendants. In the interests of convenience and clarity, I shall deal first with the four remaining defenses, and lastly with the counterclaim for reformation.

**Estoppel.**

The defense of estoppel rests on the following allegations:

a) That plaintiff and other employees were employed and paid in accordance with collective bargaining agreements.

b) That neither plaintiff nor other employees ever made a claim for additional compensation.

c) That defendant, in determining lease rentals, acted to its detriment in reliance on labor cost calculated on the basis of these collective bargaining agreements. 1394

This defense lacks validity in the light of existing authorities. The fact of the existence of an employer-employee relationship based upon collective bargaining agreements does not alter the obligation of an employer to comply with the Fair Labor Standards Act. *Overnight Motor Transportation Co., Inc., v. Missel*, 316 U. S. 472. Mr. Justice Reed, after discussing the purposes of the Act, and the public policy it embodied, said:

"If overtime pay may have this effect on commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions 'from the reach of dominant constitutional power.'" 1395

Vide, Wage and Hour Division, Interpretative Bulletin, No. 8, paragraphs 4, 7. Certainly, as plaintiff contends, employees paid in accordance with such collective agreements are not barred from seeking recovery on back wages. *Adams, et al., v. Union Dime Saving Bank*, 48 Fed. Supp. 1022; *Interpretative Bulletin*, No. 8, paragraphs 4, 5, 6, 7; (N.B. The opinions of the Administrator are persuasive and entitled to great weight. *United States v. Darby*, 312 U. S. 100, 119; *United States v.*



1396

*Opinion by Goddard, D. J.*

*American Trucking Associations, Inc., et al.*, 310 U. S. 534, 549; *Bumpus v. Continental Baking Co.*, 124 Fed. [2nd] 549 [C. C. A. 6]).

1397

Nor is the fact that no claim for additional compensation was ever made by plaintiff material. Plaintiff seeks here to enforce a public and not a private right. Congress set the standards for labor embodied in the Act in order to increase substandard pay, discourage overtime work, relieve unemployment, and to induce work-sharing. *Overnight Motor Transportation Co., Inc. v. Missel, supra*, at pp. 577-8. The parties cannot, by private agreement, circumvent the public policy expressed in the Act, and it is equally without merit to say that a party is estopped from seeking his rights, as here, under the Act, because he had not claimed them earlier.

1398

As to the loss in lease rentals which defendants claim to have suffered—hardship cannot excuse a failure to comply with the Act. *Missel case, supra*, at p. 583; *Rigopoulos, et al., v. Kervan*, 47 Fed. Supp. 576, 577. Besides, there is considerable doubt, in the light of the record, as to whether any loss in rentals was occasioned by the alleged miscalculation of labor costs. The testimony of Mr. Spear, Vice President of Spear & Co., Inc., is eloquent on this point.

### *Payment.*

This (fourth) defense is based on the assumption that the collective agreements under which plaintiff was employed and paid, complied with the Act. The argument is that no regular hourly rate was provided by the agreements, but that plaintiff was employed at such implied rates as would, with overtime pay at time and a half for hours in excess of the Act's standards, equal the regular weekly wages actually paid. This defense is insufficient in law. *Missel case, supra*; *Bumpus v. Con-*

*tinental Baking Co.*, 124 Fed. (2nd) 549, 552 (C. C. A. 6); *Carleton Screw Products Co. v. Fleming*, 126 Fed. (2nd) 537, 540; *Hargrave v. Mid-Continent Petroleum Corp.*, 42 Fed. Supp. 908, 909; *Garfity, etc., v. Bagold Corp., et al.*, opinion of Judge Sheintag, New York Supreme Court, New York Law Journal, March 11, 1943; *Adams, et al. v. Union Dime Savings Bank, supra.*

### Seventh Defense.

Here, plaintiff offers a settlement, i. e., payment of unpaid overtime compensation. This combined with an allegation of good faith, and a statement that the application of the Act to these particular employees was doubtful prior to the decision in *Kirschbaum v. Walling*, 316 U. S. 517, is relied upon to bar the recovery of liquidated damages and attorney's fees. This defense, too, is invalid in light of the *Missel* case. The same argument was advanced in that case, and it was held that the liquidated damages provision was "mandatory on the courts" (pp. 581-2). See also *Rigopoulos v. Kervan, supra.* Thus, an award for liquidated damages and attorney's fees is not left to the discretion of the courts, and neither good faith nor a settlement can justify a court in refusing to give effect to its provisions. It is a compulsory corollary to an award of back overtime pay.

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### Constitutionality.

Defendants plead that that part of the Act permitting recovery of liquidated damages and attorney's fees, i. e., Section 16(b) is unconstitutional if recovery is permitted in the circumstances of this case. *Overnight Motor Transportation Co., Inc., v. Missel*, 316 U. S. 572, specifically upheld the constitutionality of Section 16(b). See *Adams, et al., v. Union Dime Savings Bank, supra.*

1402

Opinion by Goddard, D. J.

*Counterclaim.*

Defendants' counterclaim for reformation on the ground of mutual mistake of fact and law on the part of the parties as to the collective bargaining agreements, and the applicability or non-applicability of the Act to their employment relationships.

1403

It is well settled in the federal courts (as it was at common law) that equity will not grant reformation for a mistake of law. In the earliest Supreme Court case, *Hunt v. Rousmaniere* (Peters), the court remarked:

"We hold the general rule to be, that a mistake of this character (a mistake of law) is not a ground for reforming a deed \* \* \*, and whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character."

The *Hunt* case was subsequently affirmed by the court in *Bank of United States v. Daniel*, 37 U. S. (12 Pet.) 30. Discussing the exceptions to the general rule, the court there said (p. 39):

1404

"The few cases which form exceptions to the rule will usually be found to contain some other ingredient than mere mistake or ignorance, such as surprise, undue influence, or oppression."

The Supreme Court in *Snell v. Insurance Co.*, 98 U. S. 85, quoted Story's Eq. Jurisprudence to the effect that these exceptional cases where a court of equity may grant reformation for mistake of law are "resting on discretion, and to be exercised only in the most unquestionable and flagrant cases." See also *Griswold v. Hazard*, 141 U. S. 260. Cf. *Philippine Sugar, etc., Co. v. Philippine Islands*, 247 U. S. 385, where reformation was granted, but in that case "the language used did not

fully or accurately express the agreement and intention of the parties" (p. 389).

It has been held that mistake as to what the courts may hold in the future is insufficient ground for reforming a contract which at the time of its execution correctly expressed the intention of parties. *McGinley Corp. v. Lido Oil Co.*, 71 Fed. (2nd) 81 (C. C. A. 5). And it is clear that "proof of the clearest and most satisfactory character" is necessary to warrant reformation. *Southern Surety Co. v. U. S. Cast Iron Pipe Co.*, 13 Fed. (2nd) 833 (C. C. A. 8).

Defendants therefore cannot get reformation. A mistake of law, if there was any here, would not warrant the granting of such relief. And there is not sufficient evidence in the record to support the allegation of a mistake of fact. See *Bailey, et al., v. Karolyna Company Ltd., et al.*, opinion by Judge Hulbert, April 10, 1943, Southern District of New York; *Garxity, etc., v. Bagold Corp., et al.*, opinion by Judge Scheintag, New York Supreme Court, New York Law Journal, March 11, 1943; *Rienzo v. City Bank Farmers Trust Company*, opinion by Judge Dineen, New York Supreme Court, New York Law Journal, April 7, 1943.

The defendant, Spear & Co., Inc., is an "employer" within the meaning of the Fair Labor Standards Act. Section 3(d) says:

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee \* \* \*"

Where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meaning may be attributable to it by other authorities, or even by common understanding. *Fox v. Standard Oil Co.*, 294 U. S. 87; *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 Fed. (2nd) 166 (C. C. A. 8).

1408

*Opinion by Goddard, D. J.*

Spear & Co., Inc., performed many of the services customarily performed by an owner managing his own building. Spear & Co., Inc., had a branch office in the Arsenal Building and was not only the rental agent for it, but hired the personnel of the building, paid them their wages, for which they were reimbursed by the owner, directed and supervised them in the performance of their duties. In other words, Spear & Co., Inc., managed the building for the owner.

1409

On appeal to the Circuit Court of Appeals, *Fleming v. Arsenal Building Corporation*, 125 Fed. (2nd) 278 (C. C. A. 2), that court indicated that Spear & Co., Inc., came within the definition of an "employer" under the Act, for it said in its opinion

"We may ignore the defendant, Spear & Company, Inc., for any decision as to it must concededly follow that as to the Arsenal Building Corporation."

1410

Section 16(b) of the Act provides for the payment of overtime in accordance with Section 7(a) and fixes the liquidated damages to which an employee is entitled as an additional amount equal to the unpaid overtime; it also provides that the award shall also include a reasonable attorney's fee to the plaintiff and costs.

It has been stipulated that if entitled to recover, the plaintiff is entitled to recover the following respective amounts for overtime exclusive of any additional amounts which may be awarded as liquidated damages, attorneys' fees, or costs, and less deductions for Social Security Tax and the "Victory Tax," if such deductions are required by law:

Meyer Greenberg	\$184.00
George W. Silvera	210.84
Harry B. Simon	208.45



Santiago Balara	35.10
Jerry Suarez	35.98
Philip Haberman	178.49
Julio Roque Del Valle	183.23
Michael Cassar	200.34
Joseph A. Costa	195.50
John Cassar	174.86
Jose Garcia	197.79
Anthony Cali Lo Spesa	94.36
Harry Blum	193.69
Clarence Bryant	205.46
Eli Davis	227.53
Jose Martinez	219.80
Jose L. Garcia	165.80
Arthur Lipsman	201.78
August Gangi	164.96
Charles Anderson	234.32
V. James Catone	207.42
Manuel Longueria	655.55
Manuel Veiga	179.93
Raymond Ramo	659.30
Julius Falcheck	71.74
Andrew Martinez	93.87

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As liquidated damages the plaintiff is entitled to an award equal to the amount due him for overtime. The case was well prepared, tried and briefed by both counsel and the trial occupied some eight court days and presented defenses that were novel. But in view of the fact that there was neither bad faith nor wilful violation of the Act, and that the amount which the Wage and Hour Division of the United States Department of Labor found to be due to the respective plaintiffs for overtime was offered to them by defendants before trial and refused, and the fact that the mandatory penalties imposed by the Act are severe, the fee of the attorney for the plaintiff should

1414

*Opinion by Goddard, D. J.*

be limited to quite a reasonable one, and it is fixed at \$750.

In the case at bar the plaintiff is entitled to collect the amount due him from the defendant, Arsenal Building Corporation, or from the defendant, Spear & Co., Inc.

Plaintiff may have a decree accordingly, and plaintiff may submit upon five days notice proposed findings of facts and conclusions of law.

July 12, 1943.

1415

HENRY W. GODDARD,  
U. S. D. J.

1416

**Defendants' Notice of Appeal.**

1417

**IN THE DISTRICT COURT OF THE UNITED  
STATES,**

**FOR THE SOUTHERN DISTRICT OF NEW YORK.**

**[SAME TITLE.]**

**Sirs:**

**NOTICE IS HEREBY GIVEN, that ARSENAL BUILDING CORPORATION and SPEAR & Co., INC., the defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on the 26th day of October, 1943, and from each and every part of said judgment.** 1418

**Dated: New York, N. Y., November 4, 1943.**

**Yours, &c.,**

**McLANAHAN, MERRITT, INGRAHAM & CHRISTY  
By Robert R. Bruce  
A Partner.**

**KENNETH C. NEWMAN,  
Attorneys for Defendants,  
Office & P. O. Address,  
No. 40 Wall Street  
Borough of Manhattan,  
New York, N. Y.** 1419

**To:**

**GEORGE J. H. FOLLMER  
Clerk of the United States District Court for the  
Southern District of New York  
VICTOR J. HERWITZ, Esq.  
Attorney for Plaintiff  
521 Fifth Avenue  
New York, N. Y.**

1420

**Plaintiff's Notice of Appeal.****UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****[SAME TITLE.]****Sirs:**

1421

NOTICE IS HEREBY GIVEN that plaintiff in the above entitled action hereby appeals to the Circuit Court of Appeals for the Second Circuit from that portion of the final judgment entered in this action on October 26, 1943, which awarded plaintiff an attorney's fee in the sum of \$750.00 as insufficient and not a reasonable counsel fee within the meaning of Section 16(b) of the Fair Labor Standards Act.

Dated, New York, N. Y., November 18, 1943.

**VICTOR J. HERWITZ****Attorney for Plaintiff****521 Fifth Avenue****New York, N. Y.****To:**

1422

**McLANAHAN, MERRITT, INGRAHAM & CHRISTY, Esqs.****Attorneys for Defendant****40 Wall Street****New York, N. Y.**

**Stipulation re Contents of Record.**

1423

**IN THE****DISTRICT COURT OF THE UNITED STATES,****FOR THE SOUTHERN DISTRICT OF NEW YORK.****[SAME TITLE.]**

The parties hereto, by their respective attorneys, stipulate and agree that the record on the appeals of the plaintiff and defendants from the judgment of this Court rendered the 26th day of October, 1943, shall be constituted of the portions of the record, proceedings, and evidence in the case as set out herein below, said portions of the record, proceedings and evidence being designated as the record on appeal.

1424

1. Statement under Rule 13, Subdivision 4.
2. Summons and amended complaint.
3. Answer.
4. Stipulation dated October 30, 1942, amending complaint and answer.

5. Reply.

1425

6. Minutes of trial before Hon. Henry W. Goddard, United States District Judge, on February 8, 9, 10, 11, 15, 16, 18 and 19, 1943.

7. Stipulation herein between plaintiff and defendants dated February 3, 1944, stipulating that plaintiff's exhibits numbered 3, 7, 8, 9, 10, 11, 14, 16 and 17 and defendants' exhibits numbered A, B, C, D, E, F, H, I, L and M, be omitted from the printed transcript of record on appeal but that copies thereof will be handed up to the Circuit Court of Appeals.



1426

*Stipulation re Contents of Record*

8. Plaintiff's exhibits numbered 1, 4, 5, 12, 13, 18, and defendants' exhibits numbered G, J, K and O.

9. Findings of fact and conclusions of law, Hon. Henry W. Goddard, United States District Judge, dated October 7, 1943.

10. Opinion, Hon. Henry W. Goddard; dated July 12, 1943.

11. Judgment rendered October 26, 1943.

1427

12. Plaintiff's notice of motion dated December 24, 1943, to amend judgment, and attached affidavit.

13. Opinion, Hon. Henry W. Goddard, dated January 18, 1944, on motion to amend judgment.

14. Order on motion to amend judgment nunc pro tunc, dated February 5, 1944.

15. Defendants' notice of appeal filed November 4, 1943.

16. Plaintiff's notice of appeal filed November 18, 1943.

17. Designation of portions of record to be contained in the record on appeal—stipulation.

Dated: New York, N. Y., February 3, 1944.

1428

VICTOR J. HERWITZ

Attorney for Plaintiff

McLANAHAN, MERRITT, INGRAHAM & CHRISTY

and KENNETH C. NEWMAN

Attorneys for Defendants

**Stipulation.****UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****[SAME TITLE.]**

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, April , 1944.

AARON BENENSON,

Attorney for Plaintiff.

McLANAHAN, MERRITT, INGRAHAM & CHRISTY  
and KENNETH C. NEWMAN,  
Attorneys for Defendants-Appellants.

1432

## Clerk's Certificate.

## UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

1433

I, George J. H. Follmer, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of April, in the year of our Lord one thousand nine hundred and forty-four, and of the independence of the said United States the one hundred and sixty-eighth.

GEORGE J. H. FOLLMER,  
Clerk.

(Seal)

1434

[fol. 479] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT, OCTOBER TERM, 1943

No. 400

(Argued June 19, 1944. Decided July 18, 1944)

MEYER GREENBERG, suing in behalf of himself and other employees and former employees of defendants similarly situated, Plaintiff-Appellee-Appellant,  
against

ARSENAL BUILDING CORPORATION and SPEAR & Co., INC., Defendants-Appellants-Appellees

Before Augustus N. Hand, Chase and Clark, Circuit Judges  
Appeal from the United States District Court for the Southern District of New York

From a judgment that the plaintiff recover from the defendants under the Fair Labor Standards Act, both in his own behalf and as representative of other employees of the Arsenal Building Corporation, the sum of \$10,759.16 as overtime compensation and liquidated damages, \$2,151.80 as average interest upon the respective awards, together with \$31.50 costs and \$750 attorneys' fees, the defendants have appealed. The plaintiff has appealed from the attorneys' fees allowed on the ground of insufficiency. Judgment modified by increasing the attorneys' fee to \$1,250; otherwise affirmed.

[fol. 480] McLanahan, Merritt, Ingraham & Christy and Kenneth C. Newman, Attorneys for Defendants-Appellants-Appellees; Robert R. Bruce and John J. Boyle, Counsel.

Aaron Benenson, Attorney for Plaintiff-Appellee-Appellant; Monroe Goldwater and James L. Goldwater, Counsel.

Per CURIAM:

This is an action by the plaintiff suing for himself and co-employees of the Arsenal Building Corporation to recover overtime compensation, liquidated damages and attorneys' fees under Section 7 (a) and Section 16 (b) of the Fair Labor Standards Act. The plaintiff and those he represents were maintenance employees in an occupation necessary to the production of goods for interstate commerce. Judge Goddard, who conducted the trial in the District

Court, held both the Arsenal Building Corporation and Spear & Co. Inc., the agent of the building, liable to the plaintiff for overtime and liquidated damages, as well as for average interest upon the awards to the respective employees, and also allowed attorneys' fees of \$750. We think the judgment was right except as to the amount of the attorneys' fees and should be modified by increasing the fees to \$1,250 and with that exception affirmed.

This appeal raises the same questions we have already dealt with in *Adams v. Union Dime Savings Bank*, the decision of which is to be handed down herewith. The defendants main contention is based upon the claim that the wages of the employees of Arsenal Building Corporation were sufficient to pay the minimum statutory wages, including a one and one-half rate for overtime hours, and that in such circumstances the contracts should either be so interpreted as to bring them within the Act or should be reformed for mutual mistake so that they would comply with [fol. 481] it in their literal terms. The mutual mistake relied on is that the parties believed that the Fair Labor Standards Act did not apply to them when they contracted with one another. Judge Goddard found, on conflicting evidence, that there was no such mutual mistake. But even if there was, we are confident that they could not violate the provisions of an act designed to limit hours of labor and to require payment for overtime at a higher rate than the regular hourly wage. Our opinion in *Adams v. Union Dime Savings Bank* sufficiently discusses these questions and requires an affirmance of the judgment as to overtime and liquidated damages as against Arsenal Building Corporation.

The defendant Spear & Co., Inc., claims that it should not be held under any liability to the plaintiff for the reason that it was not an employer within the meaning of the Fair Labor Standards Act. Section 3 (d) of the Act reads as follows: "Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . ."

Judge Goddard found upon ample evidence that Spear & Co., Inc., was the renting agent for the building, hired the employees, paid them their wages, for which it was reimbursed by the owner, and directed and supervised them in the performance of their duties. As New York real estate concerns frequently do, it managed the building for



the owners. We can see no escape from the conclusion that Spear & Co., Inc., came within Section 3. Indeed, the section would have little meaning or effect if such were not the case. Our decision in *Fleming v. Arsenal Building Corporation*, 125 F. (2d) 278, intimated that Spear & Co., Inc., was an "employer" within the meaning of that Act, where we said: "We may ignore the defendant Spear & Co., Inc., for any decision as to it must concededly follow that as to the Arsenal Building Corporation."

The Supreme Court treated the word "employer" in the National Labor Relations Act, as including such agents. *Labor B'd v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. [fol. 482] 261, 263; see also *N. L. R. B. v. Hearst Publications*, decided by the Supreme Court on April 24, 1944, and *N. L. R. B. v. Lund*, 103 F. (2nd) 815, 819 (CCA. 8).

We hold that the plaintiff was entitled to interest on the unpaid wages for overtime and liquidated damages. Liquidated damages for failure to pay the minimum wages prescribed by the Act were said by the Supreme Court in *Overnight Motor Co. v. Missel*, 316 U. S. 572, 583, to be compensation, not a penalty. It added that "the retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." Upon such a theory of the employee's right interest was allowed by the New York Court of Appeals in *Pedersen v. Fitzgerald*, decided June 14, 1944, under Section 480 of the New York Civil Practice Act. Interest should have been included in the judgment before amendment but the omission was of an item implicit in the past due compensation for overtime and liquidated damages by an oversight which, under Rule 60(a) was susceptible of correction even after appeal. *Havey v. McDonald*, 109 U. S. 150, 157. See also *Rigopoulos v. Kervan*, 53 F. Supp. 829. Moreover, the objection of the defendant to the insertion of interest in the judgment is purely technical, for, if we should reverse on the defendants' appeal because of the inclusion of interest after appeal was taken, the plaintiff should be permitted to include interest in judgment upon a remand of the cause to the District Court.

We think the fee of plaintiff's attorneys was inadequate compensation for their services. The hardship upon the defendants involved in litigating the claims when the applicability of the statute was uncertain was no reason for limiting the fee of the plaintiff's attorneys to less than fair

compensation for their work. We, therefore, increase the allowance to \$1,250, and allow \$500 for services in connection with this appeal.

The judgment, as modified by allowance of the increased attorneys' fee, is affirmed.

[fol. 483] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND  
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of August one thousand nine hundred and forty-four.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

MEYER GREENBERG, etc., Plaintiff-Appellant,

v.

ARSENAL BUILDING CORPORATION, & ANO., Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is modified by increasing the allowance to plaintiff's attorneys to \$1,250.00, and allow \$500.00 for services in connection with this appeal; and as so modified is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 484] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Meyer Greenberg, etc., v. Arsenal Building Corporation & Ano. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 10, 1944. Alexander M. Bell, Clerk.

[fol. 483] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 6, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to question (h) presented by the petition for the writ and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5543)



FILE COPY

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SEP 1 1944

CHARLES ELMORE DROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944

No. **421**

ARSENAL BUILDING CORPORATION and SPEAR & Co., Inc.,

Petitioners,

*against*

MEYER GREENBERG, suing in behalf of himself and other  
employees and former employees of Defendants simi-  
larly situated,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND SUPPORTING  
BRIEF**

ROBERT R. BRUCE,  
KENNETH C. NEWMAN,  
Counsel for Petitioners.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944

No. ....

ARSENAL BUILDING CORPORATION and SPEAR & Co., INC.,  
Petitioners,  
*against*

MEYER GREENBERG, suing in behalf of himself and other  
employees and former employees of Defendants similarly  
situated,

Respondent.

Come now Arsenal Building Corporation and Spear & Co., Inc., your petitioners, by Robert R. Bruce and Kenneth C. Newman, their counsel, and move this Honorable Court that it shall by certiorari or other proper process directed to the United States Circuit Court of Appeals for the Second Circuit, require said Court to certify and remove to this Court for its review and determination, a certain case lately pending in said Court, wherein your petitioners were defendants-appellants-appellees and Meyer Greenberg, suing in behalf of himself and other employees similarly situated, were plaintiffs-appellees-appellants, and to that end your petitioners aforesaid now tender herewith their petition with a certified copy of the record in said cause.

ROBERT R. BRUCE,  
KENNETH C. NEWMAN,  
Counsel for Petitioners.



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*against*

MEYER GREENBERG, suing in behalf of himself and other  
employees and former employees of Defendants simi-  
larly situated,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

Your petitioners, Arsenal Building Corporation and  
Spear & Co., Inc., respectfully show to this Court as  
follows:

**Parties and History of the Proceedings**

1. Your petitioners are domestic corporations, organized and existing under the laws of the State of New York and maintaining places of business in the City and County and State of New York. Your petitioner, Arsenal Building Corporation, is the owner of a 40ft building known as the "Arsenal Building", located at 463 Seventh Avenue, New York City. Your petitioner, Spear & Co.,

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Inc., acts as agent in managing the building owned by your petitioner, Arsenal Building Corporation.

2. Respondent is now and was during the period embraced by this action, an elevator operator in the Arsenal Building.

3. Respondent commenced this action on August 13, 1942, in behalf of himself and 25 other building service employees of the Arsenal Building similarly situated, in the United States District Court for the Southern District of New York. Respondent sued under Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201, et seq.) to recover overtime wages allegedly due respondent and the other employees under Section 7 (a) of that Act for their respective periods of employments between October 24, 1938, the effective date of the Act, and February 5, 1942, together with liquidated damages of an equal amount, attorneys' fees and costs.

4. Petitioners' answer admitted that respondent was covered by the Act, this Court, in *Arsenal Building Corp. et al. v. Walling*, 316 U. S. 517, decided June 1, 1942, having so held with respect to all the employees here involved, and having issued its mandate directing petitioners to refrain from further violations of the Act. In addition, petitioners pleaded several affirmative defenses and an equitable counterclaim predicated upon the fact that the entire employment of respondent and the other employees had been covered by collective bargaining agreements between the parties and upon their conduct under those agreements. In brief, the affirmative defenses were (1) payment based upon a construction of the collective agreements in compliance with the Act; (2) estoppel against respondent's complete claim; (3) estoppel against respondent's claim for liquidated damages, attorneys' fees and costs alone; (4)

unconstitutionality of Section 16 (b) of the Act for want of due process if recovery of liquidated damages were permitted under all the circumstances of this case; (5) right to arbitrate respondent's claims; and finally (6) a counterclaim for reformation of the collective bargaining agreements upon the ground that they were entered into and carried out by the parties under a mutual mistake of law and fact or of law alone regarding the application of the Act to their employment relationship and that the true intention of the parties was thwarted by such mutual mistake.

5. Trial of the action was had before the Honorable Henry W. Goddard, District Judge of the United States District Court for the Southern District of New York, during February 1943. Judge Goddard filed an opinion on July 12, 1943 (Record 464-472) sustaining respondent's claim and judgment (R. 454-456) was entered on Oct. 26, 1943 pursuant to findings of fact and conclusions of law (R. 25-36). The judgment entered against both petitioners in favor of respondent and the other employees similarly situated, totaled \$13,692.46, consisting of \$5,379.58 for overtime compensation and an equal amount of \$5,379.58 for liquidated damages, \$2,151.80 representing averaged interest upon the total recovery of overtime compensation and liquidated damages from the midpoint in the period October 24, 1938 through February 5, 1942, to the date of the entry of judgment, \$750.00 attorneys' fees and \$31.50 costs and disbursements. Interest on the overtime and liquidated damages had not been prayed for in the complaint and was not included in the original judgment entered on October 26, 1943. However, the original judgment was amended nunc pro tunc by order dated February 5, 1944 (R. 462-463), upon respondent's motion after both parties had filed notices of appeal from the original judgment.

6. Appeals were thereupon taken by petitioners and respondent to the United States Circuit Court of Appeals for the Second Circuit (R. 473, 474). Petitioners appealed



from the judgment in its entirety; respondent only from that part of the judgment granting him a counsel fee of \$750.00 on the ground that such fee was insufficient. On July 18, 1944, the Circuit Court modified the judgment of the District Court by increasing the attorneys' fee allowed the respondent to \$1,250.00, but otherwise affirmed the judgment.

7. On August 2, 1944, the Second Circuit Court entered its order upon the stipulation of the parties staying and withholding its mandate in this case for a period of 30 days, pending this application by your petitioners for a writ of certiorari to said Court.

### **Jurisdiction**

8. The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. 347 as amended by the Act of February 13, 1925, to which Rule XXXIX of the Rules of this Court is applicable.

### **Facts as Established by the Findings**

9. The relevant findings of the Trial Court are substantially as follows (both paraphrased and quoted findings being assigned their actual numbers in parentheses).

"(2) During the period covered by the complaint, defendant Arsenal Building Corporation was the owner of a 22-story and basement loft building located at 463 Seventh Avenue, New York, N. Y., known as the Arsenal Building (referred to hereafter as 'the building')" (R. 26).

"(3) During the period covered by the complaint, defendant Spear & Co. Inc. acted as the agent of and for the account of defendant Arsenal Building Corporation in the management and operation of the building, had authority to hire and fire employees engaged in the operation and maintenance of the building, is-

sued instructions to and controlled, directed and supervised the employees in the performance of their duties and otherwise acted in the interest of defendant Arsenal Building Corporation in relation to such employees" (R. 26).

"(4) During the period in question defendant Spear & Co. Inc. performed many of the services customarily performed by an owner managing his own building; and defendant Spear & Co. Inc. had a branch office in the Arsenal Building and was not only the rental agent for it but hired the personnel of the building, paid them their wages, for which they were reimbursed by the owner, directed and supervised them in the performance of their duties" (R. 26).

"(5) During the period covered by the complaint plaintiff Meyer Greenberg was employed by defendants as an elevator operator in the Arsenal Building" (R. 26).

"(24) Since about 1934, there have been in existence in New York City two associations of building owners and managing agents, known as Midtown Realty Owners Association, Inc. and Penn Zone Association, Inc. (called herein the Associations), whose members owned and managed real property located within the said Garment Center area and whose principal purposes were to advise their members with regard to their labor relations, to assist them in the negotiation of contracts with representatives of their building service employees and to promote friendly relations with the various unions in the field" (R. 31).

"(25) During the period covered by the complaint, defendant Arsenal Building Corporation was a member of the said Midtown Realty Owners Association, Inc." (R. 31).

"(26) During the period covered by the complaint, defendant Arsenal Building Corporation was a party to, and the said Arsenal Building was a signatory building under, certain master collective bargaining agreements entered into between the said Associations, acting on behalf of their members, and certain labor

unions including primarily Local 32-B, Building Service Employees International Union A. F. of L. (called herein the Union), acting on behalf of the members of said Union, governing the terms and conditions of employment of building service employees in the so-called signatory buildings owned or operated by the members of said Associations, to wit, the so-called Extended Mahoney Agreement dated February 19, 1936, as amended by the so-called Alger Agreement dated May 21, 1937 and the Arbitration Award made thereunder and part of said Agreement known as the Alger Award, effective February 1, 1938, and the so-called McGrady Agreement, effective February 4, 1939, together with the so-called Wolff Award, effective August 4, 1940, made under and as a part of said McGrady Agreement. The said McGrady Agreement is typical of the collective bargaining agreements involved in this action and a complete copy thereof, being Plaintiff's Exhibit 3, is incorporated herein and made a part of this finding" (R. 31-32).

"(27) During the period covered by the complaint, plaintiff Meyer Greenberg and all other building service employees employed in the Arsenal Building were members of Local 32-B, Building Service Employees International Union A. F. of L." (R. 32).

"(28) During the period covered by the complaint, the plaintiff Meyer Greenberg and all the other employees of the Arsenal Building were employed and paid in accordance with said collective bargaining agreements" (R. 32).

"(29) During the period covered by the complaint, plaintiff Greenberg and all the other employees of the Arsenal Building were employed and actually worked, pursuant to said collective bargaining agreements, on the basis of a specified maximum work week at a specified regular weekly wage and were paid at the rate of time and one-half for all hours worked in excess of such regular maximum work week" (R. 32-33).

"(30) Plaintiff Meyer Greenberg in particular was employed and actually worked in the Arsenal Build-

ing during the following periods on the following basis:

October 24, 1938 to February 2, 1939—\$17.75  
per week for a 48-hour week  
February 3, 1939 to August 1, 1940—\$28.75  
per week for a 47-hour week  
August 2, 1940 to February 5, 1942—\$29.33  
per week for a 46-hour week (R. 33).

“(31) During the period between June 25, 1938, when the Act was passed and February 3, 1942 when the McGrady Agreement expired, no claim was ever made by the Union to the Associations or the Realty Board that the employees whom the Union represented were covered by and entitled to the benefits of the Act in any respect” (R. 33).

“(32) In the Wolff arbitration in August, 1940 under the McGrady Agreement wherein it was provided that, at the request of either party, the question of wages for the period from August 4, 1940 to February 3, 1942 should be arbitrated if the parties do not agree thereon, no claim was ever made by the Union that the employees whom it represented were entitled to the benefits of the Act in any respect” (R.33).

“(33) No claim was ever made by the Union to defendant Arsenal Building Corporation or defendant Spear & Co., Inc. that the members of the Union employed in the Arsenal Building were entitled to the benefits of the Act in any respect or to any other or different pay or rate of pay than that prescribed by the collective bargaining agreements involved in this case” (R. 33-34).

“(14) Defendants failed to prove a mutual mistake of either fact or law respecting applicability or non-applicability of the Fair Labor Standards Act, in connection with the entering into of the various agreements referred to in defendants' answer and particularly the so-called McGrady Agreement” (R. 29).

“(16) Defendants failed to prove a mutual understanding of the parties to the negotiations leading up to the so-called McGrady Agreement, or any other

agreement referred to in defendants' answer, as to any specific provision or actual terms intended to be included in or constitute their agreement, as to wages and hours in the event that the Fair Labor Standards Act should apply" (R. 29-30).

"(17) Defendants delayed unreasonably in asking the relief sought by the counterclaim for reformation" (R. 30).

(11) There was neither bad faith nor wilful violation of the Act by petitioners (R. 29).

(11) The full amount of the overtime due respondent and the other employees similarly situated for the period October 24, 1938 to February 5, 1942, as determined by the Wage and Hour Division of the United States Department of Labor, was offered to respondent and the other employees before commencement of the action and refused (R. 29).

### Questions Presented

10. On the basis of the foregoing, petitioners desire this Court to review the following questions:

(a) Whether collective bargaining agreements which provided no express hourly rate of pay but called for a specified regular weekly wage and overtime compensation at the rate of time and one-half for hours in excess of the regular workweek (of 47 and 46 hours in successive periods), were in compliance with Section 7(a) of the Act where the regular hourly rate reasonably to be implied therefrom always exceeded the minimum hourly rate required by Section 6 of the Act.

(b) Whether the collective bargaining agreements and the conduct of respondent employees thereunder in relation to petitioners give rise to an equitable estoppel against the recovery of liquidated damages, interest, attorneys' fees and costs by respondents. Implicit in this question, whether any concept of public



policy embedded in the Act or in the law generally precludes the raising of such an estoppel.

(c) Whether, under the circumstances of this case, petitioners' offer to pay the full overtime compensation due under Section 7 (a) of the Act promptly after coverage of building service employees was determined by this Court, precluded any further liability for liquidated damages, interest, attorneys' fees and costs.

(d) Whether allowing respondent employees to recover liquidated damages, interest, attorneys' fees and costs under all the circumstances of this case produces a result so harsh and grossly inequitable as to constitute an application of Section 16 (b) of the Act that is violative of due process under the Fifth Amendment.

(e) Whether the findings of the Trial Court, affirmed by the Circuit Court, that there was no mutual mistake of fact or law in the making and carrying out of the collective bargaining agreements and no consequent frustration of the true intention of the parties, and also that petitioners delayed unreasonably in seeking reformation of the collective bargaining agreements, are not clearly erroneous and contrary to the great weight of evidence.

(f) Whether as held by the Second Circuit Court of Appeals "reformation of a contract which in terms violated a remedial statute would tend to frustrate the administration of the Act and contravene its policy."\*

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\* The quotation is from the opinion of the Second Circuit Court of Appeals in *Adams v. Union Dime Savings Bank*, which involved some but not all the questions raised by this case. We refer to the opinion of the Circuit Court in the *Adams* case because of the following reference by the Circuit Court in the instant case: "Our opinion in *Adams v. Union Dime Savings Bank* sufficiently discusses these questions and requires an affirmance of the judgment as to overtime and liquidated damages as against Arsenal Building Corporation" (R. 481). A petition for certiorari in the *Adams* case is now before this Court, October Term, 1944, No. 387.

(g) Whether Section 3(d) of the Act defining the word "employer" embraces an agent such as Spear & Co., Inc., and abrogates the common-law rule that an agent is not liable for wages contracted on behalf of his principal unless expressly assumed.

(h) Whether Section 16(b) of the Act in providing for liquidated damages in an additional amount equal to unpaid minimum wages or unpaid overtime compensation under Sections 6 and 7 of the Act and also in allowing a reasonable attorneys' fee and costs of the action, did not establish a uniform and exclusive measure of recovery under the Act and thereby preclude the allowance of any additional recovery of interest under State law, in this case, Section 480 of the New York Civil Practice Act.

### **Reasons in Support of Petition**

11. Five of the questions presented in this case (paragraphs 10 (b), (c), (f), (g) and (h)) are novel and important questions in the construction and application of the Fair Labor Standards Act of 1938 which have not been but should be settled by this Court. Two of these questions (paragraphs 10 (b) and (f)) have also been presented to this Court by the petition for certiorari in *Union Dime Savings Bank*, petitioner v. *Ira Adams, et al.*, respondents, October Term, 1944, No. 387, which has heretofore been filed. The questions set forth in paragraphs 10 (g) and (h) are not presented by the *Union Dime Savings Bank* petition and record.

(a) This Court has not yet reviewed the question whether employees who have accepted the full benefits of collective bargaining agreements freely and fairly negotiated and made no claims or demands under the Act during the life of such agreements, particularly under circumstances tending to show that

both employees and employers believed in good faith that the Act did not apply to their employment relationship, can still recover liquidated damages, interest, attorneys' fees and costs under Section 16(b) of the Act. In other words, this Court has not reviewed a case where the defense has been made that circumstances such as here presented give rise to an estoppel against claims for liquidated damages under Section 16(b) of the Act as distinguished from overtime compensation under Section 7(a).

(b) This Court has not yet reviewed the question whether an employer's offer to pay full overtime compensation due under Section 7(a) made with reasonable promptness after coverage of the Act has been judicially determined, precludes any additional recovery of liquidated damages, interest, attorneys' fees and costs under Section 16(b).

(c) This Court has not yet reviewed the question whether it would be contrary to the policy of the Act to reform a collective bargaining agreement entered into and carried out under a mutual mistake regarding application of the Act to the employment relationship involved, in order to carry out the true intention of the employer and employees to make a lawful agreement for a specified regular weekly wage.

(d) This Court has not yet reviewed the question arising on this record under Section 3(d) of the Act as to whether or not the definition of the word "employer" was intended to embrace an agent who at common law would not be liable for wages contracted on behalf of his principal as an employer. The Circuit Court in its opinion in this case (R. 481) took note of the fact that it is customary practice for New York real estate concerns to manage buildings for the owners as so-called "managing agents".

The record in this case shows that petitioner, Spear & Co. Inc. during the period involved in this action was managing agent for approximately 100 New York City loft and office buildings (R. 179). To the knowledge of petitioners' attorneys there are many cases now pending in both Federal and State Courts to recover back overtime wages under the Fair Labor Standards Act against managing agents as well, as against their principals—the owners. In some instances where the buildings involved have been sold and transferred to new owners and the original landlord corporation has been dissolved actions have been commenced against the managing agents alone. Individuals and firms doing business as managing agents are the victims of great injustice under the Circuit Court's ruling. Prior to this Court's decision in *Kirschbaum v. Walling*, 316 U. S. 517, such agents were just as unaware as employer landlords that the coverage of the Act extended to building service employees and had made no provision to reimburse or to protect themselves particularly in cases where the buildings managed were transferred and the landlord corporations dissolved. In view of the pending and probable litigation, the public interest will be promoted by prompt settlement in this Court of this question as to the scope of the word "employer" as defined in the Act.

(d) This Court has not yet reviewed the question whether an employee is entitled to recover interest on both the unpaid overtime compensation and the additional equal amount of liquidated damages which is allowed him by Section 16(b) of the Act as compensation for his employer's failure to pay overtime wages as required by Section 7(a). The penalty of liquidated damages under this Act has been recognized as severe by many courts including the Trial Judge in this case (R. 471). See also, *O'Neil v. Brook-*

*lyn Savings Bank*, 267 App. Div. 317. To permit the imposition of a further penalty in terms of interest on both overtime and liquidated damages under State statutes where the Federal statute is silent as to interest and has apparently spelled out the full measure of recovery in detail, unnecessarily increases the severity of the Act. It is doubly so in this case where petitioners paid their employees throughout the period in full compliance with the applicable union agreements and where the failure to comply with the Act was unintentional and without bad faith.

12. Two questions presented in this case (paragraphs 10(a) and (d) involve matters that have been before this Court under other circumstances but not so clearly and directly settled as to dispose of a mass of litigation which has arisen under the Act. Both these questions are also presented in the *Union Dime Savings Bank* petition, No. 387.

(a) In *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, 581, and *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88, 93, this Court, in construing individual employment contracts as distinguished from collective agreements with the long-established bargaining history here involved, refused to find by implication an hourly rate which would have sustained the employment as in compliance with the Act. However, there are critical differences between the facts in the above mentioned cases and the present one. In the *Missel* case, this Court said at page 581:

"But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law."



Of course, in the present case there was a definite contractual ceiling of 47 or 46 hours on the week's work with rate and one-half for hours worked in excess of the regular workweek. The minimum compensation always exceeded the Act's standard and could never be less in any event.

In *Warren-Bradshaw*, it is clear, as pointed out by Judge Hutcheson in the Circuit Court's opinion (124 F. (2d) 42, 44) "that they (the employees) worked on a straight hourly basis. . . ." In the present case, respondent worked on a regular weekly basis. Moreover, the provision for special overtime compensation for hours worked in excess of the regular workweek implied that compensation for any legal overtime within the regular workweek was absorbed in the regular weekly wage. This implication is fortified by respondent's regular weekly acknowledgments of full payment for all hours worked and their failure currently to demand additional compensation.

(b) Likewise, in *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, it was held that the imposition of liquidated damages under Section 16 (b) of the Act did not violate due process. It does not credit the function and fair tradition of this Court to suggest that this holding was meant to apply to every possible set of circumstances irrespective of the harshness and inequity of the result. That the holding is limited to the specific facts of the *Missel* case is borne out by the Court's detailed exposition (p. 582) of the employer's reasonable opportunity to determine in advance that his employee was covered by the Act. Until June 1, 1942, coverage in this case was distinctly doubtful. Indeed, the great weight of authority was against it. *Fleming v. Arsenal Building Corporation*, 125 F. (2d) 278, 281.

13. The widespread public interest and great importance of these questions to real estate owners and their

building service employees is manifest. The decision of this Court on June 1, 1942, in *Kirschbaum v. Walling*, 316 U. S. 517, came as a distinct surprise and shock to independent landlords of loft buildings all over the country. Radical adjustments were necessary in many cases and were promptly made for the future. However, such adjustments could not dispose of the huge existing liabilities for overtime compensation and equal amounts of liquidated damages which fell upon real estate owners still suffering in many sections of the nation from the long depression. In New York City alone, the retroactive liability of loft building owners was estimated to approximate twelve million dollars. To the knowledge of petitioners' attorneys, there are hundreds of cases pending in the Federal and State Courts in New York City at various stages of litigation involving the same or similar issues as those now presented by this case. A large number of cases have been stipulated to abide the ultimate decision in this case or in *Union Dime Savings Bank, petitioner v. Ira Adams, et al.*, October Term, 1944, No. 387, where some but not all of the questions of law here presented are also involved but relating to other collective bargaining agreements. The collective bargaining agreements involved in this case governed employment in more than 100 loft buildings in the Garment Center area in New York City (R. 77). The collective agreements in *Union Dime Savings Bank v. Adams, et al.*, embraced about 700 loft buildings, also in the Borough of Manhattan. Virtually all these loft building owners are engaged in litigation or threatened with litigation by their employees and former employees to recover overtime compensation, liquidated damages, interest and attorneys' fees for the effective period of the Act prior to June 1, 1942.

Moreover, it is possible that the retroactive liabilities will not be limited to loft buildings but will extend to office buildings—at least those buildings where, though no physi-

cal production actually occurs, the tenants administer and supervise production elsewhere. In *Rucker v. First National Bank*, 138 F. (2d) 699 (C. C. A. 10th, 1943), it was held in such a case that the building service employees are not covered by the Act. This Court denied certiorari. 321 U. S. 769. But in *Borella v. The Borden Company*, 138 F. (2d) (C. C. A. 2d, decided July 28, 1944), a different result has been reached. If the *Borella* doctrine is ultimately sustained, the retroactive liabilities of landlords of loft and office buildings in New York City, and, in fact, throughout the country, will be substantially increased. The final and authoritative settlement by this Court of the questions here presented will necessarily be conclusive of a great mass of pending and threatened litigation.

14. Finally, this case squarely presents important questions as to the validity and effectiveness of collective bargaining agreements negotiated and carried out during a period when the application of the Act to employments of the character here involved was not seriously regarded by reasonable men, laymen, lawyers and courts-alike. If the decision of the courts below in this case is to stand, "the process of collective bargaining is turned into a scrap of paper" with results that "cannot be joyfully regarded." (Rifkind, J. In *Adams v. Union Dime Savings Bank*, 48 F. Supp. 1022 at page 1023.)

### Conclusion

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the within cause

and to stand to and abide by such order and direction as to your Honors shall seem meet, and the circumstances of the case require, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper.

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New York, N. Y.

Dated: August 31, 1944.





IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944,

No. ....

\_\_\_\_\_  
ARSENAL BUILDING CORPORATION and SPEAR & Co., INC.,  
Petitioners,  
*against*

MEYER GREENBERG, suing in behalf of himself and other  
employees and former employees of Defendants similar-  
ly situated,  
Respondent.

**BRIEF IN SUPPORT OF PETITION**

**Opinions Below**

The opinion of the District Court is reported in 50 F. Supp. 700. The opinion of the Second Circuit Court of Appeals is not yet reported.

**Jurisdiction**

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. 347, as amended by the Act of February 13, 1925, to which Rule XXXIX of the Rules of this Court is applicable.

## Statement of Case

A sufficient statement of the case will be found in the accompanying petition (pp. 3 to 10) and in the interest of brevity will not be repeated.

### Relevant Provisions of Statutes Involved

#### FAIR LABOR STANDARDS ACT OF 1938

##### Sec. 3 (d)

“‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”

##### Sec. 7 (a)

“No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

“(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

“(2) for a workweek longer than forty-two hours during the second year from such date, or

“(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

##### Sec. 16 (b)

“Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the

employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

#### NEW YORK CIVIL PRACTICE ACT

##### Sec. 480

"Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

#### Specification of Errors

The Circuit Court erred as follows:

1. In holding that the collective bargaining agreements governing respondent's employment did not comply with the Fair Labor Standards Act.

2. In holding that respondent was not estopped from the recovery of liquidated damages, interest, attorneys' fees and costs.

3. In holding that petitioners' offer to pay the full overtime compensation due under Section 7 (a) of the Act, with reasonable promptness after coverage was determined, did not preclude any further liability for liquidated damages, interest, attorneys' fees and costs.

4. In holding that the allowance of liquidated damages, interest, attorneys' fees and costs, pursuant to Section 16 (b) of the Act, under all the circumstances of this case, does not violate the requirements of due process under the Fifth Amendment.

5. In holding that there was no mutual mistake of fact or law in the making and carrying out of the collective bargaining agreements and consequent frustration of the true intention of the parties, and also in holding that petitioners were guilty of laches in seeking reformation.

6. In holding that reformation of the collective bargaining agreements in this case would contravene the policy of the Act.

7. In holding that petitioner, Spear & Co., Inc., was liable as an employer under the Act.

8. In holding that, in addition to overtime compensation, liquidated damages, attorneys' fees and costs under Section 16 (b), the judgment for respondent and the other employees should include averaged interest on both overtime and liquidated damages from October 24, 1938 to the date of entry of judgment.

## ARGUMENT

### POINT I

**The collective bargaining agreements under which respondent was employed and paid in full complied with the Act.**

Respondent complains that he was not paid "at a rate not less than one and one-half times the regular rate", for hours worked in excess of the standard workweek, as required by Section 7 (a) of the Act.\* "Regular rate" means "regular hourly rate"; *Overnight Motor Co. v. Missel*, 316 U. S. 572, 579. Hence, the critical task of the Court is, to determine at what regular hourly rate respondent was employed throughout the period October 24, 1938 to February 5, 1942.

But respondent was neither hired nor paid by the hour. No hourly rates were provided in the collective bargaining agreements, nor was any formula or method for determining hourly rates prescribed therein.

Under the collective agreements, respondent's regular rate was a weekly rate, as follows:

October 24, 1938 to February 2, 1939—\$27.75  
per week for a 48-hour week

February 3, 1939 to August 1, 1940—\$28.75  
per week for a 47-hour week

August 2, 1940 to February 5, 1942—\$29.33  
per week for a 46-hour week

(Finding No. 30, R. 33):

In the absence of any special circumstances, the simple rule set forth in *Overnight Motor Co. v. Missel*, *supra*, in

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\* In the previous action of *Arsenal Building Corporation et al. v. Walling*, 316 U. S. 517, the construction and effect of these collective agreements was not litigated. The sole issue was coverage. Petitioners' counsel in that action (Transcript of Record, p. 27) admitted "for the purpose of this suit only that they are not and have not been conformed to the provisions of Section 7 of the Fair Labor Standards Act \* \* \*"



the footnote at page 580, would doubtless apply: "Wage divided by hours equals regular rate".\* However, in *Warren Bradshaw Co. v. Hall*, 317 U. S. 88, 93, it is strongly suggested that a different rule applies where the weekly salary is intended to include additional compensation for overtime hours. In the present case, there is no express agreement to that effect, but there are substantial reasons for implying such an understanding from the terms of the collective agreements and the conduct of the parties thereunder.

First, the collective agreements provided for overtime beyond the regular workweek of 47 or 46 hours at rate and one-half the regular weekly wage, thereby implying that all overtime worked within the regular workweek was absorbed in the regular weekly wage. Second, respondent signed a weekly payroll acknowledging payment in full for all hours worked each workweek. Third, and perhaps most conclusive, at no time from the effective date of the Act on October 24, 1938 to February 5, 1942, the end of the period for which respondent sues, did respondent or the union representing him ever demand any additional compensation for the regular workweek.

The implication that the regular weekly wages prescribed by the collective bargaining agreements were intended to include full compensation for any legal overtime included within the specified workweek, is not unreasonable. It is a fair and natural inference from the agreement to pay and the agreement to accept a specified number of dollars per week for a specified number of hours worked each week.

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\* Findings 21 and 22 (R. 30-31) are not inconsistent with an argument that respondent was employed on a weekly rate and had no express hourly rate. Deductions for absence or additions for overtime beyond the regular workweek, were expressed in fractions of the regular workweek. Thus when the contract called for 46 hours per week, the employee who worked 50 hours would receive his regular week's salary plus  $6/46$ ths of such salary or rate and one half, the regular weekly wage.

Such an implication will uphold the legality of the collective bargaining agreements. The Court should endeavor to sustain the legality of a contract, particularly where the party seeking to avoid his obligation on the plea of illegality has had the benefit of full performance.

*Steele v. Drummond*, 275 U. S. 199, 205;  
*Lorillard v. Clyde*, 86 N. Y. 384, 387.

This principle would seem to apply with peculiar force to collective bargaining agreements in the interest of promoting fair and stable labor relations.

In *Overnight Motor v. Missel*, 316 U. S. 572, 581, and *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88, 93, this Court, in construing individual employment contracts as distinguished from collective agreements with the long-established bargaining history here involved, refused to find by implication an hourly rate which would have sustained the employment as in compliance with the Act. However, there are critical differences between the facts in the above mentioned cases and the present one. In the *Missel* case, this Court said at page 581:

"But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law."

Of course, in the present case there was a definite contractual ceiling of 47 or 46 hours on the week's work with rate and one-half for hours worked in excess of the regular workweek. The minimum compensation always exceeded the Act's standard and could never be less in any event.

In *Warren-Bradshaw*, it is clear, as pointed out by Judge Hutcheson in the Circuit Court's opinion (124 F. (2d) 42, 44) "that they (the employees) worked on a straight hourly basis. \* \* \*". In the present case, respondent worked on a regular weekly basis.

Petitioners do not contend that the collective agreements in this case complied with the Act because the regular weekly wage included compensation for overtime hours equal at least to time and one-half the statutory minimum rate. Argument based on that construction of the Act was rejected in the *Missel* case (p. 578). It is contended, however, that the regular hourly rate reasonably to be implied from the collective agreements exceeded the statutory minimum at all times,—indeed, was never less than 55¢ per hour (R. 16), compared to the statutory rate of 30¢ per hour—and that respondent was paid in full for his statutory overtime, in accordance with Section 7 (a) of the Act, on the basis of such implied rate.

The collective bargaining agreements in this case fully measure up to the declared policy of the Act, as expressed in the *Missel* case and in *Walling v. Belo*, 316 U. S. 624. In accordance with the spirit of the closing paragraph of the majority opinion in the *Belo* case, this Court should not, by rigid interpretation and application of the Act, upset collective bargaining arrangements which have proven mutually satisfactory to the parties.

## POINT II

**Respondent should be estopped from recovery of liquidated damages, interest, attorney's fees and costs.**

By virtue of Sections 6 and 7 of the Act, Congress mandated that employers whose employees were entitled to the benefits of the Act should receive minimum wages and overtime compensation at the rates and on the basis

specified. Thus was established a uniform national policy, creating for employers certain obligations with respect to minimum wages and maximum hours.

The liability created in Section 16 (b) of the Act for liquidated damages is of a different character. It is compensatory damage to an employee whose employer has violated Sections 6 and 7 of the Act. Recognizing the distinction between the wage requirements of these sections and the liability established by Section 16 (b) for failure to carry out these wage requirements, the United States Circuit Court of Appeals for the Fourth Circuit has held, in a well reasoned opinion, that employees who have received the full compensation due under Sections 6 and 7 may release or waive their individual claims for damages under Section 16 (b).

*Guess v. Montague*, 140 F. (2d) 500.

If an employee may waive his claim for liquidated damages under Section 16 (b) of the Act, there can be no sound reason why employee may not be estopped from such recovery by inequitable conduct.

While no deliberate fraud is charged against respondent, a constructive fraud upon petitioners is the plain result of the facts in this case. Unless respondent, his fellow employees and their union representatives acted under a mistake of law regarding application of the Act, they were guilty of fraud, in waiting more than three years until the termination of the collective agreements while building up substantial claims against petitioners for overtime, liquidated damages and interest, not to mention attorneys' fees and costs. See opinion of Rifkind, J. in *Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875, 881, where the Court, after trial in a similar case, said:

"Seriously to urge that the Union representatives were not mistaken is to charge them with fraud."

Certainly nothing in the policy of the Act or the law generally will condone and aid conduct tantamount to fraud.

*Mortenson v. Western Light & Telephone Co.*,  
42 F. Supp. 319.

### POINT III

**Petitioners' offer to pay respondent full overtime compensation under Section 7 (a), made with reasonable promptness after coverage was established by this Court, precluded any further liability.**

Section 7 (a) of the Act does not fix the time when overtime compensation must be paid. "The intention to permit a reasonable time for payment should be inferred." Callahan, J., dissenting in *O'Neill v. Brooklyn Savings Bank*, 257 App. Div. 317 at page 324; aff'd without opinion, 293 N. Y. 666.

Under respondent's interpretation, petitioners became liable on each weekly pay day after October 24, 1938 for overtime worked during the previous week, and immediately upon failure to pay such overtime became liable for an equal amount of liquidated damages. In addition, the Circuit Court has now held that petitioners must pay interest on both of these amounts from each weekly pay date when they fell due.

Plainly, what may be a reasonable time for employers such as petitioners to pay overtime in 1944 does not hold for the period 1938 to 1942.

The Administrator of the Fair Labor Standards Act has never lacked zeal in his assertions of coverage of the Act. Yet in the various Interpretative Bulletins issued from time to time to guide employers with respect to the construction of the Act, there was never any hint that



the Administrator regarded building service employees of independent landlords of loft and office buildings as covered. (See Interpretative Bulletin No. 1, issued Sept. 22, 1938 and Interpretative Bulletin No. 5 issued Dec. 2, 1938 and reissued in revised form Nov. 27, 1939.)

In March, 1940, the Administrator commenced an injunction suit in the Southern District of New York against petitioners as a "test" case to determine the coverage of the Act as applied to such situations. The case, *Fleming v. Arsenal Building Corporation*, 38 F. Supp. 207, a forerunner of this action, was decided on April 11, 1941 by Judge Woolsey, who held the Act inapplicable and dismissed the government's complaint.

Meanwhile on June 7, 1940, the Act was held inapplicable to the employees of a loft building landlord whose tenants concededly produced goods for commerce, in *Killingbeck v. Garment Center Capitol, Inc.*, 259 App. Div. 691. At the time there could have been little doubt as to the soundness of this result in the minds of the judges of the New York Appellate Division, First Department, and of the Court of Appeals, for leave to appeal was promptly denied by both. 259 App. Div. 1076; 284 N. Y. 818.

On December 30, 1941, the Circuit Court of Appeals for the Second Circuit reversed Judge Woolsey's decision, dismissing the Administrator's injunction suit (125 Fed. [2d] 278.) Judge Learned Hand's opinion evidences no compelling conviction, conceding (at p. 281) that "so far the score is four to one against the view we take" and "Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling."

On June 1, 1942 this Court settled the application of the Act as applied to employees of the two loft building landlords then before the Court but admitted, with slight consolation for bewildered property owners and their

lawyers, that the search for "a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle." *Kirschbaum v. Walling* and *Arsenal v. Walling*, 316 U. S. 517, at page 520.

The search is not yet ended. Cf. *Rucker v. First National Bank*, 138 F. (2d) 699 (CCA 10th, 1943) cert. denied 321 U. S. 769; and *Borella v. The Borden Company*, — F. (2d) —, (CCA (2d) decided July 28, 1944).

Adding the uncertainty of the law to the facts that respondent employees never claimed any benefits under the Act until June, 1942, that the powerful labor union representing the interests likewise made no claims, and that petitioners carried out the collective bargaining agreements in complete good faith, it becomes not only unreasonable but unmoral to hold that petitioners should have paid overtime each week during the period 1938-1942.

If payment of overtime to respondent by petitioners could not reasonably be required until after the decision of this Court in *Kirschbaum v. Walling* on June 1, 1942, then certainly the offer to pay the accumulated overtime wages in July, 1942, before commencement of this action, was prompt under the circumstances and petitioners did not "violate" Section 7 (a). There being no violation of Section 7 (a), by virtue of petitioners' offer which respondent refused, no liability for liquidated damages, interest, attorneys' fees and costs could arise under Section 16 (b) (See dissenting opinion in *O'Neill v. Brooklyn Savings Bank*, 267 App. Div. 317).

## POINT IV

To hold petitioners for liquidated damages, interest, attorneys' fees and costs, would be an unconstitutional application of Section 16 (b) of the Act under the circumstances of this case.

The harshness and severity of Section 16 (b) has been the subject of comment by many courts. No set of circumstances arising under the Act to date has presented results more shocking than those illustrated here.

Two approaches from the viewpoint of due process are possible: First, the obligation on which the penalties or so-called "liquidated damages" under Section 16 (b) were predicated in this case, were too vague and indefinite.

*Connally v. General Construction Co.*, 269 U. S. 385;

*Small v. American Sugar Refining Co.*, 267 U. S. 233;

*U. S. v. Cohen Grocery Co.*, 255 U. S. 81;

*Standard Chemicals & Metals Corp. v. Waugh Chemical Corporation*, 231 N. Y. 51.

Second, the cumulative factors and circumstances here presented produce a total result so oppressive and unjust as to offend established notions of due process.

*Anuchick v. Trans-American Freight Lines, Inc.*, 46 F. Supp. 861;

*Ex parte Young*, 209 U. S. 123;

*Cotting v. K. C. Stockyard Co.*, 183 U. S. 79.

## POINT V

**Reformation of the collective bargaining agreements for mutual mistake of law to carry out the true intention of the parties would not contravene the policy of the Act.**

### (a) *The Relevant Findings*

The Courts below found that there was no mutual mistake of law in the making and carrying out of the collective bargaining agreements and consequent frustration of the true intention of the parties. The short answer with respect to the finding of no mutual mistake was given by Judge Rifkind of the United States District Court for the Southern District in a similar litigation, *Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875, where he said at page 881:

“Seriously to urge that the Union representatives were not mistaken is to charge them with fraud.”

In any event, the evidence is rather overwhelming that the application of the Act to building service employees was discussed during negotiation of the McGrady agreement in December, 1938 and January, 1939, and that neither the union nor the employer-representatives believed that the Act applied to the employment relationships involved (R. 90-91, 185-186, 291-292, 322-325, 418-419).

The true intention of the parties is manifest from the collective agreements which they actually negotiated and carried out. It is not lightly to be presumed that a strong labor union, acting for more than 15,000 members and responsible associations acting for the employers, intended to violate the law of the land, particularly when their dealings were supervised and aided by outstanding public officials and citizen mediators and arbitrators ex-

pert in labor matters. The parties intended lawful arrangements and intended, moreover, that a specified number of dollars per week should be full compensation for a specified number of hours worked each week. The fact that there was no mutual understanding between the parties in their negotiations with respect to specific hourly rates or a formula for determining such rates (see Finding No. 16, R. 29-30) is immaterial. The general objectives of a lawful agreement and specified weekly compensation having been agreed upon, the parties necessarily intended whatever means or method would achieve the agreed objectives.

The finding that petitioners delayed unreasonably in seeking reformation (Finding No. 17, R. 30) is also clearly erroneous. This Court did not determine until June 1, 1942 that building service employees were under the Act. Respondent commenced this action for back overtime wages on August 13, 1942. Petitioners' answer promptly counterclaimed for reformation of the applicable collective bargaining agreements on the ground of mutual mistake of law.

*(b) Reformation is Within the Power of the Court*

In carrying out the terms of the Alger Agreement from October 24, 1938, when the Act became effective until the McGrady Agreement succeeded it, and in entering into and carrying out the McGrady Agreement from February, 1939 to February 5, 1942, petitioners and respondent intended to comply with law and further intended that the specified regular weekly wages should be paid and accepted for the specified maximum workweek of 47 or 46 hours. Because of their mutual and bona fide mistake as to the application of the Act, the true intention of the parties has been frustrated. The Court is not asked to make new contracts for the parties but to reform the language of the contracts they did make in order to give effect to their true intention. Because of their mistake



as to the application of the Act, the parties did not include hourly rates or a formula for determining hourly rates which would, in compliance with the Act, yield the agreed weekly wage. The Court in reforming these contracts merely supplies the hourly rate, which is the means necessary to carry out the intended objectives.

The power of the Court to grant relief under these circumstances is established.

*Philippine Sugar Estates Development Co., Ltd.  
v. Government of the Philippine Islands*, 247  
U. S. 385, 389;

*Millspaugh v. Cassedy*, 191 App. Div. 221;

*Berry v. 34 Irving Place Corporation*, 52<sup>o</sup> F. Supp.  
875, 881.

Had the parties apprehended the scope of the Fair Labor Standards Act in June, 1938, when it became law, they could, and would have written their collective contracts so as to carry out their intention to comply with law and provide the same weekly earnings for the same maximum workweek actually agreed upon between them. Agreement upon an hourly rate yielding wages no greater than before the Act, was lawful.

*Walling v. Belo*, 316 U. S. 624;

*Atlantic Company v. Walling*, 131 Fed. (2d) 518;

*White v. Witwer Grocer Co.*, 132 Fed. (2d) 108;

*Shepler v. Crucible Fuel Co.*, 140 Fed. (2d) 371.

That which the parties could lawfully have done in October 1938 or February 1939, this Court can now do by way of reformation if the parties so intended. In substance and purpose the Act has never been violated.

## POINT VI

**Petitioner Spear & Co., Inc. is not an employer within the meaning of the Act.**

Petitioner Spear & Co., Inc. dealt with the employees of the Arsenal Building and the world in general as an agent. The payroll sheets which respondent and the other employees signed each week designated Arsenal Building Corporation as "Employer" and Spear & Co., Inc. as "Agent," and show that the employer's Social Security tax was paid by Arsenal Building Corporation (Def. Ex. H admitted R. 166—folder of exhibits). Respondent stated that he was employed by the Arsenal Building Corporation, and that is the name appearing on the reverse side of his Social Security card as employer (Def. Ex. E admitted R. 66—folder of exhibits). The management agreement between Spear & Co., Inc. and the owner (Pl. Ex. 4, R. 438-440, admitted R. 52) refers to Spear & Co., Inc. as the "Agent."

There was never any assumption of liability by Spear & Co., Inc. for the wages of respondent nor intent to do so. At common law there would be no liability to respondent or the other employees of the Arsenal Building for such wages.

*Hall v. Lauerdale*, 46 N. Y. 70;

*Keskal; et al. v. Modrakowski*, 249 N. Y. 406.

We do not believe it was the intention of Congress to abrogate established rules of agency in cases arising under the Act. There is nothing in the Act itself or in the legislative history to justify so sweeping a conclusion. It has been held that it is not the purpose of the Act to create new wage liabilities.

*Bowman v. Pace Co.*, 119 F. (2d) 858, 860;

*Helena Glendale Ferry Company v. Walling*, 132 F. (2d) 616, 620;

*Maddox v. Jones, et al.*, 42 F. Supp. 35, 40-42.

To hold Spear & Co., Inc. liable as an employer creates an absurd and unreasonable result. The rule of statutory construction announced by this Court in *U.S. v. American Trucking Association*, 310 U. S. 534, 542, is applicable.

## POINT VII

**Section 16 (b) establishes a uniform and exclusive measure of recovery under the Act and forecloses additional damages under State Law.**

No provision of the Act provides for recovery of interest. Congress undoubtedly intended that the statutory award of liquidated damages would compensate for any and all damages resulting from the retention of overtime compensation or minimum wages.

*Overnight Motor Co. v. Missel*, 316 U. S. 572, 583;

*Pedersen v. Fitzgerald Construction Co.*, 293 N. Y. 126 (dissenting opinion).

The Fair Labor Standards Act was intended to establish a uniform national policy with respect to minimum wages and maximum hours. This intention should govern the construction and application of all its provisions. Uniform treatment will not be afforded all employees if some are entitled to recover interest and others denied it depending on the statutes of the various states.

The fact that Congress did not provide for interest while expressly authorizing attorneys' fees and costs leaves no doubt that interest was excluded as an element of recovery. Sec. 480 of the New York Civil Practice Act cannot extend the scope of the Fair Labor Standards Act. The latter is paramount and exclusive.

*Chicago, M., St. P. & P. R. Co. v. Busby*, 41 F. (2d) 617;

*Myrmann v. N. Y., N. H. & H. R. R. Co.*, 258  
N. Y. 447;

*Norton v. Erie Railroad Company*, 163 App. Div.  
468.

### CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

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CHARLES ELMORE OROPLEY  
CLERK

**Supreme Court of the United States**

OCTOBER TERM, 1944

No. 421

ARSENAL BUILDING CORPORATION and SPEAR & Co., Inc.,  
Petitioners,

v.

MEYER GREENBERG, suing in behalf of himself and other  
employees and former employees of defendants simi-  
larly situated.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR PETITIONERS**

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# Supreme Court of the United States

OCTOBER TERM, 1944

No. 421

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ARSENAL BUILDING CORPORATION and SPEAR & Co., INC.,  
Petitioners,

v.  
MEYER GREENBERG, suing in behalf of himself and other  
employees and former employees of defendants similarly  
situated.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF FOR PETITIONERS

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### Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 50 F. Supp. 700. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 144 F. (2d) 292.

### Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit which Petitioners seek to have reviewed was filed on August 10, 1944 (R. 482). The petition for a writ

of certiorari was filed herein on September 1, 1944 and was granted by order of this Court filed November 6, 1944, limited to question (h) presented by the petition (R. 483).

The jurisdiction of this Court is based on Section 240(a) of the Judicial Code, 28 U. S. C. 347 as amended by the Act of February 13, 1925.

### **Question Presented**

Whether Section 16(b) of the Fair Labor Standards Act (52 Stat. 1069, 29 U. S. C. Sec. 216(b)) in providing for liquidated damages in an additional amount equal to unpaid minimum wages or unpaid overtime compensation under Sections 6 and 7 of the Act and also in allowing a reasonable attorney's fee and costs of the action, did not establish a uniform and exclusive measure of recovery under the Act and thereby preclude the allowance of any additional recovery of interest under State law, in this case, Section 480 of the New York Civil Practice Act.

### **Pertinent Provisions of Statutes Involved**

#### **FAIR LABOR STANDARDS ACT OF 1938**

##### **Sec. 7(a)**

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his

employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

#### Sec. 16(b)

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

#### NEW YORK CIVIL PRACTICE ACT

#### Sec. 480

"Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

## Statement

### (a) Parties and Proceedings

Petitioners are domestic corporations, organized and existing under the laws of the state of New York and maintaining places of business in the City, County and State of New York. Petitioner, Arsenal Building Corporation, is the owner of a loft building known as the "Arsenal Building", located at 463 Seventh Avenue, New York City; petitioner, Spear & Co., Inc., acts as agent in managing the building owned by Arsenal Building Corporation (R. 25-26).

Respondent is now and was during the period embraced by this action, an elevator operator in the Arsenal Building (R. 26). Respondent commenced this action on August 13, 1942, in behalf of himself and 25 other building service employees of the Arsenal Building similarly situated, in the United States District Court for the Southern District of New York. Respondent sued under Section 16(b) of the Fair Labor Standards Act of 1938 to recover overtime wages allegedly due respondent and the other employees under Section 7(a) of that Act for their respective periods of employment between October 24, 1938, the effective date of the Act, and February 5, 1942, together with liquidated damages of an equal amount, attorneys' fees and costs.

Petitioners' answer admitted (R. 10) that respondent was covered by the Act, this Court in *Arsenal Building Corp. v. Walling*, 316 U. S. 517, decided June 1, 1942, having so held with respect to all the employees here involved and having issued its mandate directing petitioners to refrain from future violations of the Act. In addition, petitioners pleaded several affirmative defenses and an equitable counterclaim predicated upon the fact that the entire em-



ployment of respondent and the other employees had been governed by collective bargaining agreements between the parties and upon their conduct under those agreements.<sup>1</sup>

The nature of the defenses interposed by petitioners is not now material in view of the limited nature of the review granted by this Court.

Trial of the action was had before the Honorable Henry W. Goddard, District Judge of the United States District Court for the Southern District of New York, during February, 1943. Judge Goddard filed an opinion on July 12, 1943 (R. 464-472) sustaining respondent's claim and judgment (R. 454-456) was entered on October 26, 1943 pursuant to findings of fact and conclusions of law (R. 25-36). The judgment entered against both petitioners in favor of respondent and the other employees similarly situated, totaled \$13,692.46, consisting of \$5,379.58 for overtime compensation and an additional equal amount of \$5,379.58 for liquidated damages, \$2,151.80 representing averaged interest at 6% upon the total recovery of overtime compensation and liquidated damages from the midpoint in the period of employment, October 24, 1938 through February 5, 1942, to the date of the entry of judgment, \$750.00 attorneys' fees and \$31.50 costs and disbursements. Interest on the overtime and liquidated damages had not been prayed for in the complaint and was not included in the original judgment entered on October 26, 1943. However, the original judgment was amended *nunc pro tunc* by order dated February 5, 1944 (R. 462-463).

Appeals were thereupon taken by petitioners and respondent to the United States Circuit Court of Appeals

<sup>1</sup> In the previous action of *Arsenal Building Corp. v. Walling*, 316 U. S. 517, the construction and effect of these collective agreements was not litigated. The sole issue was coverage. Petitioners' counsel in that action (Transcript of Record, p. 27) admitted "for the purpose of this suit only that they are not and have not been conformed to the provisions of Section 7 of the Fair Labor Standards Act \* \* \*"

for the Second Circuit (R. 473, 474). Petitioners appealed from the judgment in its entirety; respondent only from that part of the judgment granting him a counsel fee of \$750.00 on the ground that such fee was insufficient. On July 18, 1944, the Circuit Court modified the judgment of the District Court by increasing the attorneys' fee allowed the respondent to \$1,250.00, but otherwise affirmed the judgment (R. 479-482).

On August 2, 1944, the Second Circuit Court entered its order upon the stipulation of the parties staying and withholding its mandate in this case for a period of 30 days, pending this application by your petitioners for a writ of certiorari to said Court.

**(b) Relevant Findings**

Respondent and the other employees on whose behalf he sued were all members of Local 32-B, Building Service Employees International Union, A. F. of L. (called the Union herein) and were employed continuously under various collective bargaining agreements (R. 31-32).

Between Oct. 24, 1938, the effective date of the Act and June 1, 1942, the date of this Court's decision in *Arsenal Building Corp. v. Walling*, 316 U. S. 517, no claim was ever made to petitioners by respondent and the other employees or by their Union for additional wages under the Act (R. 33-34).

There was neither bad faith nor wilful violation of the Act by petitioners (R. 29).

The full amount of the overtime due respondent and the other employees similarly situated for the period October 24, 1938 to February 5, 1942, as determined by the Wage and Hour Division of the United States Department of Labor, was offered to respondent and the other employees before commencement of the action and refused (R. 29).

## **Specification of Error**

The Circuit Court erred as follows:

In holding that the judgment for respondent and the other employees should include interest on both overtime and liquidated damages from the respective dates when overtime compensation became due to the date of entry of judgment.

## **Summary of Argument**

The legislative history, administrative interpretation and general canons of construction, especially as reflected in other statutes involving comparable questions, demonstrate that Congress intended to formulate by Section 16(b) of the Act, a complete, uniform and exclusive measure of damages for violation of the Act. Interest pursuant to state law cannot therefore be added to any recovery under Section 16(b) since the Federal Act is paramount.

## **ARGUMENT**

### **i**

**By Section 16(b) of the Act Congress formulated a complete, uniform and exclusive measure of damages governing employees' suits in all courts.**

The question presented involves the construction and application of a federal statute. Its answer is therefore governed by federal rather than state law. "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy,

conflicting state law and policy must yield." *Sola Electric Co. v. Jefferson Co.*, 317 U. S. 173, 176; *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 245; *Deitrick v. Greaney*, 309 U. S. 190, 200; *Board of County Commissioners, v. United States*, 308 U. S. 343, 349-50.

This principle applies even "in the absence of an applicable federal statute" where federal rights are at stake. Thus, in *Royal Indemnity Co. v. United States*, 313 U. S. 289, 296, this Court held that it was for the Federal courts to determine "according to their own criteria," the rule governing interest to be recovered as damages for delayed payment of a contractual obligation to the United States.

In determining the extent of the damages to be awarded employees in civil actions against their employers for violations of the Fair Labor Standards Act, particularly whether or not interest shall be part of the recovery before judgment, there is no need for federal courts to search for and apply their own criteria. Congress itself has laid down the rules. "The provisions of the Act of Congress are the limits of liability which can be imposed on an employer." *Campbell v. Zavelo*, 243 Ala. 361, 366, 10 So. (2d) 29 (1942).<sup>2</sup>

<sup>2</sup> In this case, the Supreme Court of Alabama said:

"For the purpose of another trial, we should say, under the holdings of Supreme Court of the United States, the compensation by way of liquidated damages for failure to pay minimum wages under sections 6(a) and 7(a) of the Act, 29 U. S. C. A. sections 206(a), 207(a), is not a penalty or punishment of the government—*Overflight Motor Transportation Co., Inc. v. Missel*, *supra*. In our opinion interest should not be computed on the double payment for overtime work authorized by the Act of Congress. That is to say, the provisions of the Act of Congress are the limits of liability which can be imposed on an employer. The justice of this holding is dictated by the difficulty of the employer to ascertain whether or not his business is within or without the Act of Congress."

(continued on opposite page)

### (a) Legislative History of the Act

The legislative history with reference to Section 16(b) of the Act is meager. Such as it is, it points unerringly to the conclusion that Congress had no thought that an employee's recovery for violation of the Act would be more than twice the amount of wages withheld plus an attorney's fee and costs. Under the heading "Penalties," the Conference Report said:

" \* \* \* This section also provides for civil reparations for violations of the wages-and-hours provisions. If an employee is employed for less than the legal minimum wage, or if he is employed in excess of the specified hours without receiving the prescribed payment for overtime, he may recover from his employer twice the amount by which the compensation he should have received exceeds that which he actually received." (83 Cong. Rec. 9255, 1938).

During the final debate in the House, Representative Keller, himself a member of the Conference Committee, stated in part:

"Among the provisions for the enforcement of the act an old principle has been adopted and will be ap-

Apart from the *Campbell* case, we are not aware of any other appellate decisions discussing the problem of interest under Section 16(b) except that of the Second Circuit Court of Appeals in the instant case and of the New York Court of Appeals in *Pedersen v. J. F. Fitzgerald Construction Co.*, 293 N. Y. 126, 129-30; now Docket No. 462 and assigned for argument with this case. Of lower court decisions, Judge Rifkind's opinion in *Berry v. 34 Irving Place Corp.*, 7 Wage and Hour Reporter 682 (S. D. N. Y., June, 1944), is worthy of mention. After distinguishing the cases relied on by Judge Leibell in *Rigopoulos v. Kervan*, 53 F. Supp. 829 (S. D. N. Y., Nov. 1943), Judge Rifkind says in part:

"The statutory provision of the Fair Labor Standards Act for liquidated damages is designed to compensate for the damages resulting from the retention of the workman's pay \* \* \* which otherwise might be too obscure and difficult of proof.' Nothing in the statute suggests anything but a legislative intention to provide a uniform rule as to such damages, a rule in no way dependent upon the varying standards and provisions of the several states."



plied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. \* \* \* (83 Cong. Rec. 9264, 1938).

#### (b) Administrative Interpretation

The Administrator who is charged with enforcement of the Act and whose interpretations, even though informal, have been accorded great weight by this Court (*United States v. American Trucking Associations*, 310 U. S. 534, 549; *Skidmore v. Swift and Company*, — U. S. —, Docket No. 12, decided December 4, 1944), has never considered interest on wages withheld or on the additional equal amount of liquidated damages as a part of the employee's right of recovery for violations.

In a pamphlet issued in 1938 by the U. S. Department of Labor entitled "A Ceiling for Hours, A Floor for Wages and a Break for Children—An Explanation of the Fair Labor Standards Act of 1938" (U. S. Government Printing Office, 1938), it is said (page 13):

"Employees may bring suit themselves or through an agent in any court of competent jurisdiction to recover unpaid minimum wages or unpaid overtime compensation. Employers violating the wage or hour requirements are liable for unpaid sums plus an equal amount as damages, court costs, and reasonable attorneys' fees."

In another brochure published by the U. S. Department of Labor, Wage and Hour Division, entitled "The Wage and Hour Law—What It Is" (U. S. Government Printing

Office, 1941), the following statement appears at page 9:

**"To make the law partially self-enforcing, Congress provided that any worker whose employer violated the law could sue him in court and collect double any back wages illegally withheld plus an attorney's fee and court costs."**

A special brochure published by the Wage and Hour Division and circulated among employees and labor organizations under the title "Workers—How the Wage-Hour Law Affects You" (U. S. Government Printing Office, 16-10316), advises in question and answer form as follows (page 10):

**"Q. Can I collect back wages?"**

**"A. You are entitled to sue your employer in court. If violation of the law is proved, your employer may be compelled to pay you twice the amount due, plus court costs and a reasonable attorney's fee."** (Emphasis theirs.)

Employers were similarly advised in an "Employers' Digest of the Fair Labor Standards Act of 1938" (U. S. Government Printing Office, 16-10292). It was explained that "This digest has been prepared as a guide to employers' responsibilities under the Fair Labor Standards Act of 1938." Under the heading "Penalties" on page 4, it is said:

**"Employers violating the wage and hour requirements are liable for double the unpaid sums plus court costs and reasonable attorney's fee."**

The most significant manifest of the Administrator's interpretation of the Act with respect to interest has been his

<sup>2</sup> Similar characterization of the employee's rights and the employer's liability appear in the Annual Reports of the Wage and Hour Division. See, for example, Annual Report, 1940, page 95; Annual Report, 1941, pages XIII and 51-52.

policy in restitution cases. Through amicable arrangements or by litigation often culminating in consent decrees, the Administrator has required employers to make restitution of back wages illegally withheld (for the procedure in restitution cases, see Annual Report, Wage and Hour Division, 1940, pp. 87, 89-90). From the effective date of the Act in October, 1938 to October, 1943, the cumulative total of such restitutions was approximately \$55,000,000, covering 1,500,000 workers in 70,000 establishments. (Annual Report, Wage and Hour and Public Contracts Divisions, 1942-1943, mimeograph p. 9.)

We are aware of no reported case where the Administrator has required the payment of interest upon restitution of back wages to employees, and have been advised by attorneys for the Wage and Hour Division that it has never been the practice of the Division to do so.

The Administrator's published interpretation of employee rights and employer obligations under Section 16(b), as well as his consistent practice in restitution cases, bespeak the Administrator's belief as one "charged with the responsibility of setting its machinery in motion" that the Act confers no right of interest on withheld wages. This is more than negative construction and, though not, it would still be significant. *Overnight Motor Co. v. Missel*, 316 U. S. 572, footnote at pages 580-81.

**(c) General Canons of Interpretation: Comparable Questions Under Other Federal Statutes**

If Congress had merely authorized employees to sue in any court of competent jurisdiction for wages unlawfully withheld under Sections 6 and 7 of the Act, this Court would undoubtedly hold, in accordance with established federal criteria, that interest may be allowed from the date when the wages should have been paid even though the Act were silent as to interest and even though no other applicable federal statute permitted it. This on the prin-

ciple that interest is generally allowed "for damages caused by delay in discharging a duty and therefore in default on a contract to pay money." *Billings v. United States*, 232 U. S. 261, 284-288; cf. *Board of County Commissioners v. United States*, 308 U. S. 343, 352; *Faber v. City of New York*, 222 N. Y. 255, 262, 118 N. E. 609 (1918).

But in enacting Section 16(b) Congress did more than merely authorize suits for wages unlawfully withheld under Sections 6 and 7. Instead of relying on the courts to apply the general rule and award interest as damages for failure to pay money, Congress expressly stated its own rule of damages for violations of the duties created by Sections 6 and 7. Thus it said that the infringing employer "shall be liable" for the unpaid wages and "in an additional equal amount as liquidated damages." (Emphasis ours.) See *Guess v. Montague*, 140 F. 2d 500, 505 (C. C. A. 4, 1943).

Instead of interest which might conceivably vary from state to state even under a federal rule (See opinion of Black, J. dissenting in *Royal Indemnity Co. v. United States*, 313 U. S. 289, 298), Congress decreed a uniform rule of liquidated damages equal in amount to the unpaid wages. Moreover, Congress had another reason for a definite rule of damage as suggested by this Court in *Overnight Motor Co. v. Missel*, 316 U. S. 572, 583-584, where it was

"It is interesting to note that there are few cases, if any, involving orders for reinstatement with back pay under the National Labor Relations Act, 29 U. S. C. 160(c) where the employer has been ordered by the Board to pay interest on backpay. This involves a situation analogous to that assumed above. Presumably this Court would sustain an award of interest if the Board found that it would "effectuate the policies" of the Labor Act. *Virginia Electric Co. v. National Labor Relations Board*, 319 U. S. 533, 539. But cf. *Corning Glass Works v. National Labor Relations Board*, 129 F. (2d) 967, 973 (C. C. A. 2, 1942) where the Court itself allowed interest after the date of the Board's order on sums found due by the Master in contempt proceedings.

said: "The wages were specified for him by the statute, \* \* \*. The liquidated damages for failure to pay the minimum wages under Sections 6(a) and 7(a) are compensation, \* \* \*. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."

Having established a rule of damages for failure to pay wages which would, in effect, include interest<sup>5</sup> and make whole the loss ordinarily compensated by interest, it is not reasonable to assume that Congress intended that damages be further aggravated by piling interest upon interest. Compounding of interest is not favored in the absence of contract or statute. *Cherokee Nation v. United States*, 270 U. S. 476, 490; But cf. *L. & N. R. R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 240 where it was pointed out that the compounding of interest there attacked was equivalent to the compounding normally incident to the allowance of interest on an award.<sup>5</sup>

Examination of various multiple damage acts reveals no instance where interest has been allowed. (Sherman Act, 15 U. S. C. 15; Seamen's Act, 46 U. S. C. 596; Emergency Price Control Act, 38 Stat. 640, 50 U. S. C. A.

<sup>5</sup> Interest allowed by the Interstate Commerce Commission and sustained by this Court in actions under the Interstate Commerce Act (49 U. S. C. 8 and 16) provide an interesting contrast. Section 8 makes the carrier liable "for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court \* \* \* and collected as part of the costs in the case." In justifying the Commission's long established practice of allowing interest, this Court said in *Pennsylvania R. R. Co. v. Minds*, 250 U. S. 368, 370-71: "For years these claims have been contested, the Company never offered any payment of the awards, and unless interest is to be allowed there seems to be no means of making the claimants whole for the wrongs sustained by violations of the statute." Obviously this reasoning does not apply to a statute such as Section 16(b) where Congress has expressly prescribed the measure and extent of damages for violation of a statutory duty.



App. 925).<sup>6</sup> Interest from the date the cause of action accrued has been consistently denied under a state treble damage statute. *Blair v. Sioux City & P. Ry. Co.*, 73 N. W. 1053, 1058 (Iowa, 1898, not officially reported).

Presumably Congress enacted Section 16(b) with the general state of the law in mind. *Cf. Hecht Co. v. Bowles*, 321 U. S. 321, 329. In this light the express provision for liquidated damages and the silence as to interest have dual significance: substitution of a definite rule of damage in lieu of interest on unpaid wages which would generally be awarded and avoidance of interest on the double damages by silence in accordance with the general rule. Moreover, the final direction that the courts—state or federal—shall allow a reasonable attorney's fee and costs of the action in addition to any judgment for damages awarded to the employee, points up the Congressional intention to exclude interest. Attorneys' fees and court costs are distinctly incidents of litigation normally within the control of the State creating the court (*cf. Frankfurter, J.*, concurring in *Brown v. Gerdes*, 321 U. S. 178, 190). Congress did not seek to control the amount of fees or costs, but knowing these are matters of procedure which state courts having concurrent jurisdiction could wholly deny, Congress protected employees by specifically requiring such allowances.

Interest, on the other hand, is a matter of substance. *Louisiana & Arkansas Ry. Co. v. Pratt*, 142 F. 2d 847, 849 (C. C. A. 5, 1944); *Kiefer v. Grand Trunk R. Co.*, 12 App. Div. 28, 32; Conflict of Laws, Restatement, Sections 412(a) and (b); Goodrich, Conflict of Laws, Section 91. *Cf. Barnes Coal Corp. v. Retail Coal Merchants Association*, 128 F. 2d 645, 648 (C. C. A. 4, 1942). As the

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<sup>6</sup> Interest is not generally allowed on damages in patent cases until filing of the Master's report. *Duplate Corp. v. Triplex Co.*, 298 U. S. 448, 459.

formulator of the *lex loci*, Congress could have provided that the courts—state or federal—entertaining actions under Section 16(b) should award interest in accordance with the law of the forum. Having provided expressly for liquidated damages and having remained silent as to interest, interest must be deemed to have been excluded. *Expressio unius est exclusio alterius*.

The decision of the Fifth Circuit Court in the recent case of *Louisiana & Arkansas Ry. Co. v. Pratt*, *supra*, is particularly apposite. There Judge Holmes speaking for the court said in part (p. 848):

“In all actions for personal injuries brought under the Federal Employers’ Liability Act, the remedy given by that statute is exclusive, and all state laws are superseded in so far as they attempt to cover the same field. At the time the Act was enacted, interest was not allowable on claims for personal injuries until the amount of damages had been judicially ascertained. This was upon the theory that no debt was due prior thereto or that interest was a part of the damages and was merged therewith in the amount awarded.

“The Act itself contains no provision with respect to interest, and the measure of damages in actions under it, being inseparably connected with the right of action created, must be settled according to general principles of law as administered in the federal courts at the time of enactment, except as modified by *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

“The item of accrued interest presents a question of substantive law. We think, therefore, that the silence of the federal statute upon the subject of interest may not be construed as leaving the subject unlegislated upon in the Act, but is indicative of the considered purpose that no interest should be allowed in such actions prior to verdict. Since the Act is exclusive, state statutes upon the measure of damages, including Louisiana Act 206 of 1916, are superseded in so far as they are in conflict.”

A similar result was reached under the Jones Act (46 U. S. C. 688) in *Cortes v. Baltimore Insular Line*, 66 F. 2d 526 (C. C. A. 2, 1933).<sup>7</sup>

The Fair Labor Standards Act was intended to establish a basic and uniform national policy with respect to minimum wages and maximum hours (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local*, 321 U. S. 590, 602). This intention ought to govern its construction and application throughout unless otherwise indicated. *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 245; *Lyeth v. Hoey*, 305 U. S. 188, 194; cf. dissenting opinion of Black, J., in *Royal Indemnity Co. v. United States*, 313 U. S. 289, 296.

Obviously the desirable uniformity cannot be achieved if interest is to be allowed under Section 16(b) in accordance with the varying laws of the states.<sup>8</sup>

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<sup>7</sup> Reference should be made to cases in which this Court has denied interest on special claims against the Government where the enabling acts are silent on the subject. *United States v. Goltra*, 312 U. S. 203, 207-211; *Tillson v. United States*, 100 U. S. 43, 46.

<sup>8</sup> An interesting illustration of the possible diversity of results is the "portal to portal" situation in the Bituminous Coal Industry. If this Court should affirm the ruling of the Fourth Circuit Court in *Jewell Ridge Coal Corp., petitioner v. Local No. 6167*, Docket No. 721, it is not unlikely that miners working under the same or similar collective agreements will bring actions under Section 16(b) for back wages on the travel time theory. Bituminous coal is mined in 31 states and Alaska. In at least one bituminous coal state, Alabama, interest would be denied under state law since the Alabama Supreme Court in *Campbell v. Zavalo*, 243 Ala. 361, 366, 10 So. (2d) 29 (1942) indicated an alternative ground for its decision, that the local laws did not provide for interest in such a case. Because of the paucity of rulings on this subject it is difficult to predict what the rule would be in other states.

Interest before judgment, pursuant to State law, may not be added to a recovery under Section 16(b) of the Act, since the latter establishes a paramount and exclusive measure of damage.

The principle invoked is established by a long line of cases:

*Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 245;

*St. Louis S. F. & T. R. Co. v. Seale*, 229 U. S. 156;

*Louisiana & Arkansas Ry. Co. v. Pratt*, 142 F. (2d) 847, 849 (C. C. A. 5, 1944);

*Murmann v. N. Y., N. H. & H. R. Co.*, 258 N. E. 447 (1932).

### Conclusion

It is therefore respectfully submitted, for the reasons above set forth, that the judgment of the Circuit Court of Appeals for the Second Circuit should be modified by eliminating interest in the sum of \$2,151.80 allowed on the recovery of overtime wages and liquidated damages before judgment.

Respectfully submitted,

ROBERT R. BRUCE,  
KENNETH C. NEWMAN,  
Counsel for Petitioners.

JOHN J. BOYLE,  
of Counsel.

Dated: January, 1945.







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CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1944

No. 421

ARSENAL BUILDING CORPORATION and SPEAR & Co., Inc.,

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against

MEYER GREENBERG, suing in behalf of himself and other  
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*Respondent.*

**BRIEF FOR THE RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 421

ARSENAL BUILDING CORPORATION  
and SPEAR & Co., INC.,

*Petitioners,*

against

MEYER GREENBERG, suing in behalf of him-  
self and other employees and former em-  
ployees of defendant similarly situated,  
*Respondent.*

## BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

### Opinions Below.

The opinion of the District Court holding plaintiff entitled to judgment is reported in 50 F. Supp. 700 (R. 464-472).<sup>\*</sup> The memorandum opinion of the District Court adding interest upon respondent's motion to amend the judgment has not been reported officially but appears unofficially in 7 Wage Hour Rept. 144, 8 Labor Cases (C. C. H.) par. 62,071 (R. 461). The opinion of the Second Circuit Court of Appeals affirming the judgment in accordance with both of the opinions below has not been reported officially but appears unofficially in 7 Wage Hour Rept. 788, 8 Labor Cases (C. C. H.) par. 62,287.

<sup>\*</sup>References are to pages of the printed transcript of record.

### Jurisdiction.

The final judgment of the District Court was rendered October 26, 1943 in respondent's favor. The judgment as amended *nunc pro tunc* by order of the trial judge to add interest was filed February 5, 1944 (R. 454-456). An appeal was taken by the petitioners to the United States Circuit Court of Appeals for the Second Circuit and respondent filed a cross-appeal in that court from that part of the judgment granting him a counsel fee of \$750 on the ground that such fee was insufficient (R. 473-474). On July 18, 1944 the Second Circuit Court of Appeals handed down its affirmance of the judgment in every respect except that upon respondent's cross-appeal the judgment of the District Court was modified to increase the attorney's fee allowed in that court to \$1,250. On August 2, 1944 the Circuit Court of Appeals entered an order upon stipulation of the parties staying and withholding its mandate in the case for 30 days, pending application by petitioners for a writ of certiorari. The petition for certiorari was filed on September 1, 1944. Petitioners have invoked jurisdiction of this Court under Section 240 (a) of the Judicial Code (28 U. S. C. § 437), as amended by the Act of February 13, 1925.

### Statement.

An adequate summary of the history of the proceedings appears in the petition for certiorari (Petition for Writ, pp. 3-6) and need not be repeated here.

To this suit for unpaid overtime, liquidated damages and counsel fee under the Federal Wage and Hour Law, defendants interposed three principal defenses, payment, estoppel and reformation. It was also urged that Section 16 (b) of the Act, under which recovery was had, deprives petitioners of property without due process of law, if

recovery of liquidated damages and counsel fees is to be permitted under the circumstances. Each of the three principal pleas involves an attempt to spell out from the terms of certain collective bargaining agreements, setting minimum standards for individual contracts, of hiring in the industry of which petitioners and respondent were members, construction or implication of compliance with the Fair Labor Standards Act. Each of these defenses was held inadequate to bar recovery, both by the District Court and by the Circuit Court of Appeals, in view of the obvious fact that the collective agreements provided for overtime at the rate of time and one-half only for hours in excess of 48, 47 and 46 per week, in successive periods, whereas the Act's requirements necessitated payment of time and one-half to employees entitled to its benefits for hours in excess of 44, 42 and 40 per week during the first, second and subsequent years of its effect.\*

The lower court found after trial that during the period covered by the complaint petitioners employed respondent (Findings 5, 8; R. 26-27) and failed to pay him overtime compensation at the rates provided for by Section 7 of the Act (Finding 9; R. 27).

With respect to the estoppel defense, the trial court found upon the facts that (1) both generally speaking, and in the case of the Arsenal Building, there appeared to be no particular correlation between labor costs and

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\* Respondent has maintained throughout that the full record of testimony regarding the various collective agreements and the negotiations preliminary thereto was irrelevant in an action of this character, the sole pertinent question being the hours actually worked by respondent and his fellow employees and the wages actually paid them during the period in suit, measured against the Act's overtime requirements. Prior to putting in evidence respondent moved to strike each of the affirmative defenses as insufficient in law and the motion was renewed at the close of the case. Respondent further opposed throughout admission of evidence relating to the various collective agreements and their interpretation, as irrelevant and immaterial, the action being founded upon the Fair Labor Standards Act, and the defenses in support of which the testimony was sought to be adduced being utterly inadequate in law. A general motion to strike all of the testimony introduced by petitioners was made at the close of the case.



the fixing of lease rentals; (2) petitioners failed to prove that they relied upon any action or omission of respondent or other employees in estimating labor costs or fixing lease rentals (Findings 12, 14; R. 29).

With respect to the counterclaim for reformation, the trial court found that petitioners failed to prove a mutual mistake of either fact or law respecting applicability or non-applicability of the Act in connection with the entering into of the various collective agreements referred to; and further found that the employer's representatives, at the negotiations leading up to the agreements, did not rely upon any statement or misstatement, or any act or omission, of the union representatives (Findings 14, 15; R. 29). The trial court further found that petitioners failed to prove a mutual understanding of the parties to the negotiations leading up to the collective agreements in question as to any specific provision, or actual terms, intended to be included in or to constitute their agreement as to wages and hours in the event that the Act applied to the employment relationship (Finding 16; R. 29-30). The evidence adduced by petitioners was not sufficient to satisfy the trial court that, but for the alleged mistake, petitioners or their representatives would not have assumed the terms and provisions sought to be reformed (Finding 20; R. 30). The court below denied petitioners' claim for affirmative relief also upon a further finding that they had delayed unreasonably in seeking reformation (Finding 17; R. 30).\*

Not only did the trial court find, after a patient and painstaking development of testimony, that petitioners had failed to prove the essential facts pleaded in the principal

\* Additional findings relating specifically to the testimony adduced in connection with the defense of payment (Findings 21-22; R. 30-31) and the question of concurrent liability of the petitioner Spear & Co. Inc., the managing agent (Findings 3-5, 23; R. 26, 31), may be treated in greater detail, for the sake of convenience, with the legal argument below.

defenses of estoppel, reformation and payment, but it was also held that those defenses were inadequate in law to bar recovery (Conclusions of Law 2-4; R. 34). The additional partial defenses, seeking to bar liquidated damages and counsel fees upon grounds of good faith and offer to pay the unpaid overtime without damages, and constitutionality, respectively, were similarly stricken (Conclusions of Law 5-6; R. 34).

These were the findings and conclusions of the trial court, which the Second Circuit Court of Appeals sustained in every particular, over the arguments here renewed.

### **Statutory Provisions Involved.**

The applicable statutory provisions of Sections 7 (a), 16 (b) and 3 (d) of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 21 U. S. C. §§ 201, *et seq.*), and Section 480 of the New York Civil Practice Act, have been set forth in full in the petition (Petition for Writ, pp. 22-23).

### **Questions Presented.**

After a prolonged trial, the trial court held that the various affirmative defenses in this case were insufficient in law to bar the full recovery sought, and found that the petitioners had further failed to sustain the burden of proving material allegations necessary to support each of the principal defenses.

The questions presented, therefore, are: (1) Have the affirmative defenses of payment, estoppel and reformation, as pleaded, any validity in law or are they adequate, if proved, to bar recovery in a suit by an affected employee for back wages under the Fair Labor Standards Act; (2) with respect to those defenses, since each was based upon an essential factual background upon which the trial court's findings, sustained by the Circuit Court of Appeals

as in accord with the weight of the evidence, were all in respondent's favor, is there any substantial question for review by this court; (3) does recovery by respondent of liquidated damages, interest, attorney's fees and costs, in accordance with Section 16 (b) of the Act and Section 480 of the New York Civil Practice Act, deprive petitioners of property in violation of the Fifth Amendment to the Constitution of the United States; (4) was there any impropriety in the determination of the trial court, sustained by the Circuit Court, that petitioner Spear & Co. Inc., the managing agent, together with the building owner jointly "employed" plaintiff and his fellow workers within the meaning of the Act; (5) is the interpretation by the highest Court of New York that under its State Civil Practice Act interest is to be added to the amount of wages, including liquidated damages, recovered in a judgment such as that at bar, followed by the Circuit Court of Appeals in affirming here, subject to review in this Court?

## ARGUMENT

### I.

**There is no novel or substantial question of construction of a Federal Statute in this case not heretofore determined by this Court.**

Petitioners should be denied certiorari in view of the fact that the decision of the trial court, affirmed by the Second Circuit Court of Appeals, was in accord with the previous decisions of this Court and involved no novel or substantial question not heretofore determined here.

In the first place, validity under the Constitution of the United States of the overtime provisions of the Act was sustained in *U. S. v. Darby*, 312 U. S. 100 (1941);

the argument that the Act's basic requirements contravened the Fifth and Tenth Amendments to the Constitution was there specifically repudiated.

Next, this Court in a case involving the very employees who seek recovery in this action and the identical facts upon which they seek to base their recovery, in *Kirschbaum v. Walling* and *Arsenal Building Corp. and Spear & Co. Inc. v. Walling*, 316 U. S. 517 (1942), held on June 1, 1942 that this respondent and other building service and maintenance employees similarly situated, in their work for these petitioners, were engaged in occupations necessary to the production of goods for interstate commerce and entitled to the benefits of the Fair Labor Standards Act.

Finally, in *Overnight Motor Transport Co. v. Missel*, 316 U. S. 572 (1942) the Court upheld the validity under the Constitution of the United States of Section 16 (b) under which this action has been brought; held it mandatory in any case where violations have been established and recovery permitted that the trial court award also liquidated damages and a reasonable attorney's fee; set forth the formula for computing the amounts due where employees have been employed "under contract for a fixed weekly wage for regular contract hours which are the actual hours worked"; and ruled that recovery in a suit for back wages under the Act, given coverage and neglect or refusal to pay overtime in accordance with the Act's requirements, must follow "regardless of the good faith of the employer or the reasonableness of his attitude."\*

Further, this Court in affirming the reversal of the lower court's finding for defendants, in *Arsenal Building*

\*In the words of Mr. Justice Brandeis, which apply equally to the case at bar, "perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee." There, as here, petitioner had pointed to the fact that "if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act."

*Corp. and Spear & Co. Inc. v. Walling*, and in sending down its mandate that an injunction issue upon the whole record, conclusively established that violations of the Act occurred in connection with employment of plaintiff and his fellow workers under the identical facts here involved.\*

Nor does the purported defense of estoppel constitute a novel or substantial question of interest here. This Court has consistently held that employees may not bargain away or release the right to receive the full sums to which they are entitled under the provisions of remedial legislation enacted in the public interest establishing minimum wage and hour standards for their protection. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. See also *U. S. v. Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den. sub. nom., *Maryland Casualty Co. v. U. S.*, 305 U. S. 651. In fact this Court only in its last term had occasion to reaffirm the principle that "strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest" might move towards lending a forum to petitioners' plea of waiver or estoppel, may not avail against the rigid requirements of a statute designed for "securing the general public interest." See *Mid-State Horticultural Co. v. Penn. R. R. Co.*, U. S. , Sup. Ct. , 88 L. Ed. 83 (1943). See also *Pittsburgh C. & St. L. R. R. Co. v. Fink*, 250 U. S. 577.

And the existence of collective agreements is no excuse for failure to comply with the absolute requirements of the statute and no defense to an action maintained to recover for its violation. As was said here only a few months ago, Congress "did not intend that collective

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\* See transcript of record, *Arsenal Bldg. Corp. and Spear & Co. Inc. v. Walling* (sub. nom. *Fleming v. Arsenal Bldg. Corp. and Spear & Co. Inc.*, C. C. A. 2, Oct. Term, 1941) filed in this Court upon petition for writ of certiorari in No. 924, Oct. Term, 1941, Finding 29, R. 329.



agreements should relieve employers from paying overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts." *Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No. 123*, U. S. Sup. Ct. , 88 L. Ed. 610 (1944).\*

Nor has the defense of payment any novelty here. In virtually the same form it has been specifically rejected at least twice, which has not dissuaded petitioners from raising it again. See *Overnight Motor Transport Co. v. Missel*, 316 U. S. 572 (1942), where the appropriate method for computing overtime in a case such as that at bar was indicated.\*\* To the same effect see *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 93 (1942); *Floyd v. Dubois Soap Co.*, 139 Ohio St. 520, 41 N. E. (2nd) 893, reversed per curiam in 317 U. S. 596 (1942).

Finally, there is no novel or substantial question to be reviewed in the finding of the lower court, sustained by the Circuit Court of Appeals, that both upon the facts and upon the law, plaintiff should recover against the defendant managing agent as well as against the defendant owner. In *N. L. R. B. v. Penn. Greyhound Lines, Inc.*, 303 U. S. 261, a managing company which performed "various services relating to the employee personnel" for an affiliated operating company, was held likewise an "employer" within the meaning of the National Labor

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\*The Court further said in that case: "Congress intended \* \* \* to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."

\*\*The Court there stated that "no problem is presented in assimilating the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours which are the actual hours worked." And the Court added the formula, in a footnote, "wage divided by hours equals regular rate. Time and one-half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours," and rejected petitioner's resort to a purported presumption that the contracting parties contemplated compliance with the law.

Relations Act\*; as Mr. Justice Stone said there, "together, respondents acted as employers . . . and together actively dealt with labor relations of those employees." And the Court, as recently as the last term, indicated that the statutory definition is the only test of "employer" under the Act. *N. L. R. B. v. Hearst Publications, Inc.*, U. S. , Sup. Ct. , 88 L. Ed. 824 (1944). Accordingly, "technical concepts pertaining to an employer's legal responsibility for acts of his servants" have no bearing.\*\*

This Court has thus already ruled adversely to petitioners upon every question of substance raised in support of the petition and the decision below was in all respects in harmony with applicable decisions of this Court.

## II.

The case was decided in complete accord with innumerable decisions of the Circuit Courts of Appeals and high state courts.

There is no substantial divergence of authority in the various Circuit Courts of Appeals and high state courts upon the issues determined in this case. The decision below, affirmed by the Second Circuit Court of Appeals, was in keeping with a very considerable weight of authoritative decisions of appellate tribunals. Five different Circuit Courts of Appeals have recently indicated that Section 7 of the Wage and Hour Act is violated, and a cause of action in double the amount of underpayment accrues to the employee, immediately upon the employer's failure,

\* The appositeness of the decisions interpreting the National Labor Relations Act is clear from the similar purposes of the two statutes, as well as the fact that Section 3(d) of the Fair Labor Standards Act is virtually identical with and adopted from Section 2(2) of the National Labor Relations Act. Compare 29 U. S. C. § 203 (d) and 29 U. S. C. § 152 (2).

\*\* See *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 80-81.

even in good faith, to pay the required overtime currently at the time when earned in the regular course of employment.\*

Under the circumstances, defenses such as implication of compliance with the Act, estoppel and reformation for mutual mistake, which petitioners have sought to raise, must fail in law because they "tend to frustrate the administration of the Act and contravene its policy." See *Adams v. Union Dime Savings Bank*, F. (2d) , 7 Wage Hour Rept. 789, 8 Labor Cases (C. C. H.) pay. 62,286 (1944).\*\*

Further, it may be said that what these defenses really seek is, in effect, to establish a defense in bar or an estoppel based upon an alleged mistake or misconception as to the applicability of existing law, whereas it has long been clear that equity may not grant reformation for such a mistake. See *Hunt v. Rousmanier's Administrator*, 1 Peters (U. S.) 1 (1828). See also *Bank of U. S. v. Daniel*, 12 Peters (U. S.) 32 (1838); *Statens Island Hygeia Ice & Cold Storage Co. v. United States*, 85 F. (2d) 68 (C. C. A. 2); *Lucking v. Schram*, 117 F. (2d) 160 (C. C. A. 6).†

Passing from so-called equitable considerations to the purported defense of payment, petitioners have sought to infer that employees employed pursuant to standards

\* *Geo. Lawley & Son Corp. v. South*, 140 F. (2d) 439 (C. C. A. 1, 1944), cert. den. U. S. , May 11, 1944 (No. 908, Oct. 1943 Term); *Rigopoulos v. Kervan*, 140 F. (2d) 506 (C. C. A. 2, 1943); *Guess v. Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943); *Birbalis v. Guneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Seneca Coal & Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), cert. den. 320 U. S. 772. See also *Emerson v. Mary Lincoln Candies*, 173 Misc. 531, 174 Misc. 353, aff'd 261 A. D. 879, aff'd 287 N. Y. 577 (Ct. App. N. Y.); *Abroe v. Lindsay Bros. Co.*, 211 Minn. 136, 300 N. W. 457 (Sup. Ct. Minn.).

\*\* The appellate courts of New York State have reached the same conclusion. See *Walsh v. 515 Madison Ave. Corp.*, 267 A. D. 756 (App. Div. N. Y. 1st Dept. 1944) affirming 181 Misc. 219 (Sup. Ct. N. Y. Co. 1943) and *Garrity v. Bagold Corp.*, 267 A. D. 353 (App. Div. N. Y. 1st Dept. 1944) modifying and affirming 42 N. Y. Supp. (2d) 257 (Sup. Ct. N. Y. Co. 1943).

† Compare the recent amendment to the New York Civil Practice Act, Section 112 (f), made effective only on May 29, 1942, subsequent to the period covered by the present suit. L. 1942, c. 558, Laws of the State of New York.

established by collective agreements for a fixed agreed number of hours, regularly worked weekly, of 48, 47 and 46 in different periods, for which they were paid a regular weekly wage, with no additional compensation for overtime up to the contracted for number, were paid in accordance with the Act's overtime requirements, ignoring the fact that the Act at the same time called for time and one-half for hours in excess of 44, 42 and 40 per week during successive years. The contention is clearly contrary to the plain mandate of Section 7 of the Act. The theory that by implication the provisions of the collective agreements, or the individual contracts of hiring, may be so construed as to infer compliance, based upon assumed rates which are not the real rates, has been repudiated by authoritative decisions wherever raised.\*

As Mr. Justice REED said in *Overnight Motor Transport Co. v. Missel*, 316 U. S. 572, "implication cannot mend a contract so deficient in complying with the law" as was the collective agreement principally drawn in question here.

Finally, as the Second Circuit pointed out in affirming the present case, liability of the managing agent Spear & Co. here was intimated in the earlier decision in *Fleming v. Arsenal Bldg. Corp.*, 125 F. (2d) 278 (C. C. A. 2, 1941), affd. 316 U. S. 517 (1942).\*\*

\* See *Missel v. Overnight Motor Transport Co.*, 126 F. (2d) 98 (C. C. A. 4, 1942); *Warren-Bradshaw Drilling Co. v. Hall*, 124 F. (2d) 42 (C. C. A. 5, 1941); *Carleton Screw Products Co. v. Fleming*, 125 F. (2d) 537 (C. C. A. 8, 1941); *Bumpus v. Continental Baking Co.*, 124 F. (2d) 549 (C. C. A. 6, 1941); *Mid-Continent Petroleum Co. v. Hargrave*, 129 F. (2d) 655 (C. C. A. 10, 1943); *Tulcwater Optical Co. v. Witkamp*, 179 Va. 545, 19 S. E. (2d) 897 (Sup. Ct. Va. 1941); *Walling v. Stone*, 131 F. (2d) 461 (C. C. A. 7, 1942); *Patsy Oil Corp. v. Roberts*, 132 F. (2d) 826 (C. C. A. 10, 1942); *Graves v. Armstrong Creamery Co.*, 154 Kans. 365, 118 P. (2d) 613 (Sup. Ct. Kans. 1941); *Seneca Coal & Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943). See also *Garrity v. Bagold*, 42 N. Y. Supp. (2d) 257 (Sup. Ct. N. Y. Co. 1943), affd. 267 App. Div. 353 (App. Div. N. Y. 1st Dept. 1944); *Walsh v. 515 Madison Ave. Corp.*, 181 Misc. 219 (Sup. Ct. N. Y. Co. 1943) affd. 267 App. Div. 756 (App. Div. N. Y. 1st Dept. 1944).

\*\* "We may ignore the defendant, Spear & Co., Inc., for any decision as to it must concededly follow that as to the Arsenal Building Corporation." *Fleming v. Arsenal Building Corp.*, 125 F. (2d) 278 (C. C. A. 2, 1941).

## III.

**Each of the principal defenses presented factual issues upon which the trial court's findings, sustained by the Circuit Court of Appeals, were all in respondent's favor and there is no substantial question for review here.**

It may be said further, in opposition to the granting of a writ for certiorari here that each of the principal defenses is based upon an essential factual background upon which the trial court's findings, sustained by the Second Circuit Court of Appeals as in accord with the weight of the evidence, were all in petitioners' favor, and there is no substantial question for review by this Court.\*

## IV.

**All constitutional questions invoked by petitioners have already been passed upon by this Court.**

Petitioners have urged, as a further ground for the granting of certiorari, that imposition of the mandatory liability for liquidated damages and counsel fees upon violation, where there was difficulty in determining applicability of the Act, was violative of the due process clause of the Fifth Amendment to the Federal Constitution. This precise point has already been passed upon here and rejected by this Court. See *Overnight Motor Transport Co. v. Missel*, 316 U. S. 572 (1942). See also *U. S. v. Darby Lumber Co.*, 312 U. S. 100 (1941); *Kirschbaum v. Walling*, 316 U. S. 517 (1942).

\* See reference to principal findings upon the various defenses, pages 3-5 above.



Interpretation by the highest court of New York that under its Civil Practice Act interest is to be added to the amount of wages, including liquidated damages, recovered in the judgment, followed by the Circuit Court in affirming here, is not subject to review in this Court.

The decisions of the courts of the State of New York interpreting and applying Section 480 of the New York Civil Practice Act hold that the provision that interest in such cases "shall be added to the total sum awarded" is a mandatory provision of law absolutely binding upon courts and clerks in all cases involving suits upon contract, express or implied, whether involving liquidated or unliquidated claims. *Mayaguez Drug Co. v. G. & R. F. Ins. Co.*, 260 N. Y. 356; *McLaughlin v. Brinckerhoff*, 222 App. Div. 458; *Joannes Bros. Co. v. Lamborn*, 226 App. Div. 777; *Newburgh Dress Co. v. Nadler & Nadler, Inc.*, 251 App. Div. 330; *Greater N. Y. Coal & Oil Corp. v. Philadelphia Coal Distributing Co. Inc.*, 252 App. Div. 883.\*

Established by authoritative decisions here is the fact that the provisions of Section 480 of the Civil Practice Act, and the decisions of the courts of New York interpreting those provisions, are applicable law conclusive in this Court. *Massachusetts Benefit Assn. v. Miles*, 137 U. S. 689. Compare *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U. S. 487, where the Court recently declined to apply Section 480 upon the specific ground that the case there

\* An action under Section 16 (b) of the Fair Labor Standards Act is an action founded upon contract, and one specifically to recover wages, with respect to both unpaid overtime and the mandatory liquidated damages. *Rigopoulos v. Kervan*, 53 F. Supp. 829 (S. D. N. Y. 1943); see also *Northwestern Yeast Co. v. Broutin*, 133 F. (2d) 628 (C. C. A. 6, 1942). It has been held that the right to interest under Section 480 continues and is not waived "though not demanded in the complaint or proved on the trial." *Quinn v. Sigretto*, 229 A. D. 727 (App. Div. N. Y. 2nd Dept. 1930).

involved required application of the local law of the State of Delaware, rather than that of New York, under applicable principles of conflicts of law. See also *Funkhouse v. J. B. Preston Co.*, 290 U. S. 163.

The New York Court of Appeals held on June 14, 1944 in *Pederson v. Fitzgerald Construction Co.*, 288 N. Y. 818, 293 N. Y. 293, that a plaintiff recovering unpaid overtime and liquidated damages under the Fair Labor Standards Act is entitled, by virtue of Section 480 of the New York Civil Practice Act, to interest upon the full sums recovered, including liquidated damages. This interpretation of a statutory provision of the law of the State of New York by the highest court of that state is not subject to review here. See *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938). See also 28 U. S. C. § 725. In any event the New York statute provides a "suitable rate" of interest. *Royal Indemnity Co. v. U. S.*, 313 U. S. 289, 297 (1941).

## VI.

No adequate reason is set forth in the petition for the granting of a writ of certiorari and the application therefor should be denied.

Respectfully submitted,

GEORGE TROSK,  
Counsel for Respondent.

Of Counsel:

AARON BENENSON,  
MONROE GOLDWATER,  
JAMES L. GOLDWATER.



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**Supreme Court of the United States**

**OCTOBER TERM, 1944**

**No. 421** ✓

**ARSENAL BUILDING CORPORATION and SPEAR & Co., Inc.,**

*Petitioners,*

**VS.**

**MEYER GREENBERG,** suing in behalf of himself and other  
employees and former employees of defendants  
similarly situated,

*Respondent.*

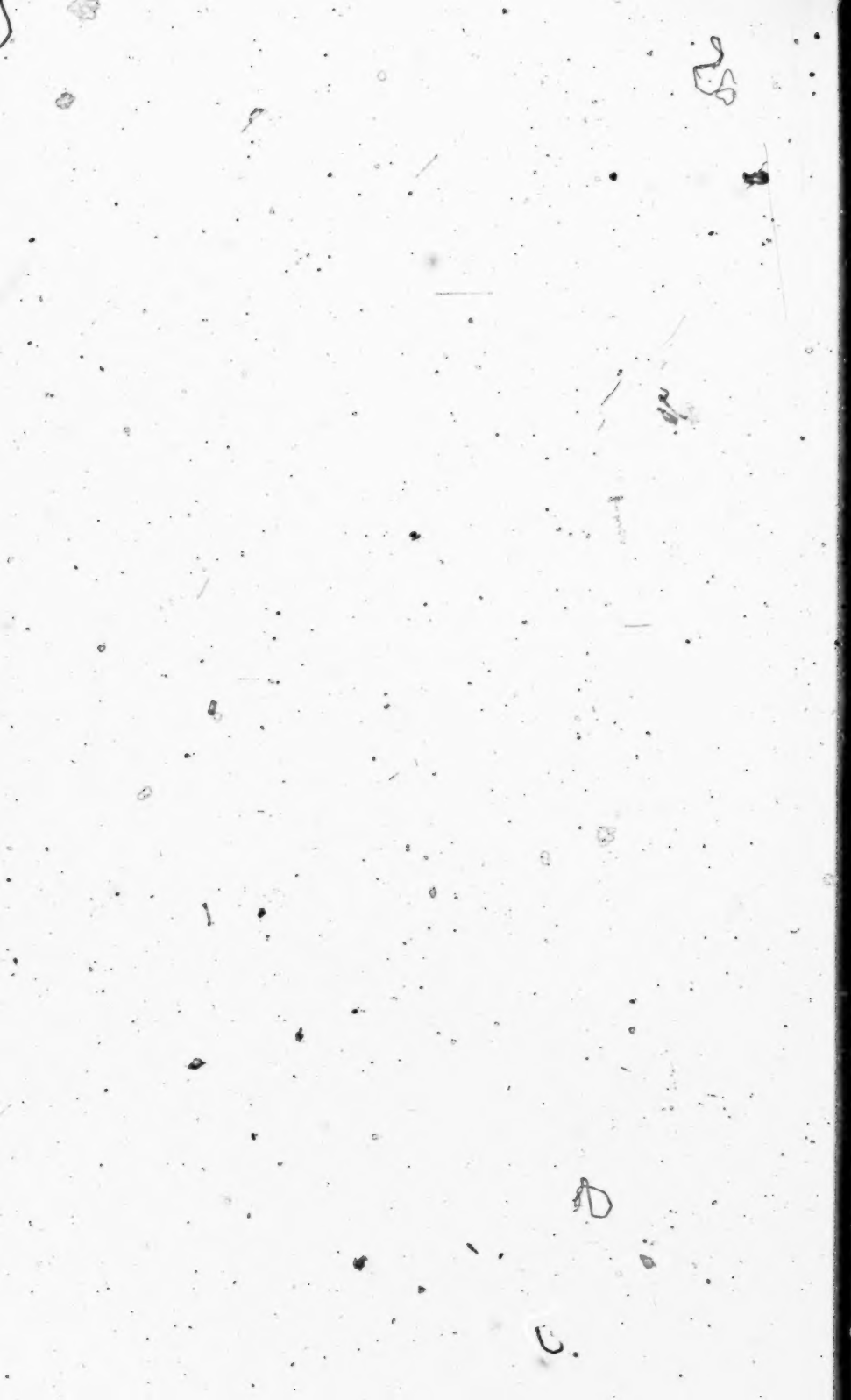
**BRIEF FOR RESPONDENT**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

✓ **AARON BENENSON,**  
*Counsel for Respondent.*

*Of Counsel:*

**JAMES L. GOLDWATER,  
HARRY RODWIN.**





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# Supreme Court of the United States

OCTOBER TERM, 1944

ARSENAL BUILDING CORPORATION and  
SPEAR & Co. INC.,

*Petitioners,*

vs.

MEYER GREENBERG, suing in behalf of him-  
self and other employees and former em-  
ployees of defendants similarly situated,

*Respondent.*

No. 421

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT

### Opinions Below.

The opinion of the United States District Court for the Southern District of New York is reported in 50 F. Supp. 700. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 144 F. (2d) 292.

### Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit which petitioners seek to have reviewed was filed on August 10, 1944 (R. 482). The petition for writ of certiorari was filed on September 1, 1944 and was granted by order of this Court filed November 6, 1944, limited to question (h) presented by the petition (R. 483).

Petitioners have invoked jurisdiction of this Court under Section 240 (a) of the Judicial Code, 28 U. S. C. § 347, as amended by the Act of February 13, 1925.



## **Statement.**

The statement of the prior proceedings in this case has been adequately set forth in petitioners' brief and need not be here repeated (Pet. Br. pp. 4-6).\*

## **Statutory Provisions Involved.**

The pertinent statutory provisions in question are Section 16 (b) of the Fair Labor Standards Act of 1938, 29 U. S. C. § 216 (b), and Section 480 of the New York Civil Practice Act, which have been set forth in full text in petitioners' brief (Pet. Br. p. 3). (See Appendix.)

## **The Issue Presented.**

The sole question upon which certiorari has been accepted here was stated as follows in the petition (Pet. for Writ p. 12):

(h) Whether Section 16 (b) of the Act in providing for liquidated damages in an additional amount equal to unpaid minimum wages or unpaid overtime compensation under Sections 6 and 7 of the Act and also in allowing a reasonable attorneys' fee and costs of the action, did not establish a uniform and exclusive measure of recovery under the Act and thereby preclude the allowance of any additional recovery of interest under State law, in this case Section 480 of the New York Civil Practice Act.

## **Summary of Argument.**

Petitioners have urged that the express language of Section 16 (b) of the Fair Labor Standards Act is subject to the construction that Congress consciously formu-

---

\* Of course respondent does not accept as relevant the findings set out in the statement which obviously have no bearing upon the question of interest and the right to its recovery (compare Pet. Br. p. 6).

lated a definite and exclusive measure of recovery for employees' suits brought under the statute in terms precluding the right to interest although otherwise recoverable under state law. Accordingly, petitioners assign error in the order of the lower Court amending *nunc pro tunc* the judgment as originally entered so as to provide for the addition of "average interest" upon the amounts of unpaid overtime and liquidated damages recovered by plaintiff in behalf of himself and his fellow employees.

Respondent's position is that the question of the right to interest here is a matter of local law in which the decision of the highest court of the State of New York was entitled to complete respect. This is certainly so unless there is some inherent conflict between the intention of Congress as expressed in the language of the statute and the interest provision of the New York Civil Practice Act. In any event, even if the interest question here is one of federal rather than state law, the federal courts will nevertheless customarily tend to accept the provision of local law which would otherwise pertain as indicating a "suitable" rule or rate. The lower court in this case having accepted the local law and adopted the local rate as suit-

\* The principle of "average interest" is merely a simple mathematical formula for computing with reasonable certainty the amount of interest owing in a case where, as here, the total amount due is made up of a cumulating liability which attaches week by week at the termination of each pay period upon failure of timely payment of wages under the statute. The amount due a particular plaintiff varies progressively upward with continuing violation.

To avoid a separate computation based upon the cumulated total due each week during a period of several years of employment, as here, the formula used is: Take the entire gross amount due in wages and damages for the overall period in question and halve it to obtain the average amount due; determine the midpoint date in the period of employment in question, that is to say, obtain an average period of time for which interest is to be computed; compute interest at the full legal rate (here 6% under Section 480 of the New York Civil Practice Act) upon the average sum due from the midpoint date to the date of termination of employment; add interest at the full legal rate upon the gross amount due from the date of termination of employment to the date of entry of judgment. This method was first suggested by the referee in *Emerson v. Mary Lincoln Candies*, 174 Misc. 353, aff'd. 261 App. Div. 3879, 287 N. Y. 577.

An affidavit in support of the motion to add interest described the "average" method of computation as a "reasonable basis" and one "without prejudice to the defendants" (R. 460). No affidavit was submitted in opposition.

able, the result is not to be disturbed here in the absence of an apparent conflict with a clearly enunciated policy of Congress or the Constitution.

## ARGUMENT

### I.

**The question of interest is a matter of local law in which the decision of the highest court of New York was entitled to complete respect.**

Controlling decisions of the courts of the State of New York interpreting and applying Section 480 of the New York Civil Practice Act have long considered the provision that "interest shall be added to the total sum awarded" in all suits upon contract, express or implied, resulting in the recovery of damages, whether liquidated or unliquidated, as a mandatory expression of the legislative will absolutely binding in all such suits.\* In the light of this fact and of the further fact that "the liability for liquidated damages under the Fair Labor Standards Act is contractual in character" [*Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 582; *Northwestern Yeast Co. v. Broutin*, 133 F. (2d) 628], the New York Court of Appeals in *Fitzgerald Construction Co. v. Pedersen*, No. 462 for argument with the case at bar, held that plaintiffs in an action under the Act are "entitled to interest on the whole of their recovery, including the liquidated damages." See 293 N. Y. 126. See also *Rigopoulos v. Kerran*, 53 F. Supp. 829 (S. D. N. Y. 1943).

Established by authoritative decisions here is the principle that the question of interest "is always one of local law." *Holden v. Freedman's Savings & Trust Co.*, 100 U. S. 72; *Ohio v. Frank*, 103 U. S. 697; *Massachusetts*

\* *Mayaguez Drug Co. v. G. & R. F. Ins. Co.*, 260 N. Y. 356; *McLaughlin v. Brinckerhoff*, 222 App. Div. 458; *Joannes Bros. Co. v. Lamborn*, 226 App. Div. 777; *Newburgh Dress Co. v. Nadler & Nadler, Inc.*, 251 App. Div. 330; *Greater N. Y. Coal & Oil Corp. v. Philadelphia Coal Distributing Co. Inc.*, 252 App. Div. 883.

*Benefit Assn. v. Miles*, 137 U. S. 689. Compare *Klaron v. Stentor Elec. Mfg. Co.*, 313 U. S. 487, 496-7; *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163, 167. See also Note, 44 Harvard Law Review 105 (1930), "Interest Rates in the Federal Courts," page 106.

Thus Chief Justice HUGHES, in *Funkhouser v. J. B. Preston Co.*, in construing Section 480, observed that:

The statute in question concerns the remedy and does not disturb the obligations of the contract.

And while *Klaron v. Stentor Elec. Mfg. Co.* was a diversity case, in which the Court was applying the principle of *Erie R. R. v. Tomkins*, 304 U. S. 64, the reasoning of Mr. Justice REED there is not inappropriate here:

Whatever lack of uniformity this (application of the rule of *Erie R. R. Co. v. Tomkins*) may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. \* \* \*

Here, however, Section 480 of the New York Civil Practice Act is in no way related to the validity of the contract in suit, but merely to an incidental item of damages, interest, with respect to which courts at the forum have commonly been free to apply their own or some other law, as they see fit.

To like effect see *Ferguson v. Union Nat. Bk.*, 126 F. (2d) 753, 759 (C. C. A. 4, 1942).

Further, the "proper function" of the federal court is "to ascertain what the state law is, not what it ought to be" (313 U. S. 487, 497); and this is certainly true unless there is some inherent conflict between the intention of Congress as expressed in the language of the statute conferring the right sued upon and the remedial provision of the law of the forum assigning the appropriate rule and

measure of interest to the recovery. See the provision of the Federal Conformity Act, 28 U. S. C. § 725, declaring local state laws applicable as "rules of decision" in the federal courts except where the Constitution or federal statutes may "otherwise require or provide." In the light of the Conformity Act, "the federal courts have gone far in construing state decisions as constructions of local statutes and hence controlling as 'rules of decision'" [44 Harvard Law Review 105, 106 (1930)]. And compare what was said in this Court in *Massachusetts Benefit Assn. v. Miles* about the necessity that "the courts of the state and the federal courts sitting within the state should be in harmony" upon questions of this character.

As will appear hereafter, there is no apparent Congressional intention expressed in the language of Section 16 (b) of the Fair Labor Standards Act to withhold recovery of interest which would otherwise pertain under applicable provisions of local law from an employee who has recovered under the federal statute. Neither the Court of Appeals of New York nor the Second Circuit found conflict between the measure of recovery accorded by Congress to affected employees under Section 16 (b) of the federal Act and the addition of interest to the recovery as prescribed under the prevailing local law.\*

\* Nor was the conflict urged by petitioners noted by the numerous courts permitting recovery of interest pursuant to § 480 in actions under Section 16(b) of the Fair Labor Standards Act. See *Emerson v. Mary Lincoln Candies*, 174 Misc. 353, 356, 20 N. Y. Supp. (2d) 570 (Sup. Ct. N. Y., Erie Co. 1940), affd. 261 App. Div. 879, 287 N. Y. 577; *O'Neil v. Brooklyn Savings Bank*, 180 Misc. 542, 43 N. Y. Supp. (2d) 25 (App. Term Sup. Ct. N. Y. 1st Dept. 1943), affd. 267 App. Div. 317, 293 N. Y. 666; *Doyle v. Johnson Bros. Inc.*, N. Y. Law Journal, Feb. 13, 1943 (App. Term Sup. Ct. N. Y. 2nd Dept. 1943) modifying and affirming *Doyle v. Johnson Bros. Inc.*, N. Y. Law Journal, July 9, 1942 (City Ct., N. Y. C., Kings Co. 1942); *Campbell v. Mandel Auto Parts Corp.*, N. Y. Law Journal, Apr. 27, 1943, 6 Wage Hour Rept. 435 (Sup. Ct. N. Y. N. Y. Co. 1943); *Schneck v. 386 Fourth Ave. Corp.*, 182 Misc. 1037 (City Ct., N. Y. C., N. Y. Co. 1944); *Asaro v. Lilienfeld*, 36 N. Y. Supp. (2d) 802 (City Ct., N. Y. C., N. Y. Co. 1942); *Schanck v. Lehigh Valley R. R. Co.*, N. Y. Law Journal, March 11, 1944 (City Ct., N. Y. C., N. Y. Co. 1944). See also *Rigopoulos v. Kervan*, 53 F. Supp. 829 (S. D. N. Y. 1943); *Clark v. 126 Fifth Ave. Corp.*, 7 Wage Hour Rept. 427, 8 Labor Cases par. 62,084 (S. D. N. Y. 1944); *Schmidt v. Emigrant Bank*, 7 Wage Hour Rept. 623, 8 Labor Cases par. 62,269 (S. D. N. Y. 1944). Contrary is *Berry v. 34 Irving Place Corp.*, 7 Wage Hour Rept. 682, 8 Labor Cases par. 62,265 (S. D. N. Y. 1944).



It follows that the local law of New York as to interest, followed by the trial judge here, was entitled to complete respect.

## II.

**Even if the interest question was one of federal rather than state law, the lower court properly accepted the local law as suitable and the result should not be disturbed.**

Even in the event the interest question here is to be deemed one of federal rather than state law, the trial court properly accepted the provision of local law as a satisfactory rule or rate with regard to interest. See *Board of Commissioners of Jackson County v. U. S.*, 308 U. S. 343, 352; *Royal Indemnity Co. v. U. S.*, 313 U. S. 289, 296-297.

While there has been some inclination in recent decisions to follow the rule indicated by state law in federal cases not founded upon a diversity of citizenship rather because the state rule was deemed suitable for adoption as the applicable federal rule in the circumstances than because of any preliminary determination that state law applied, either rationale would lead to the same result here. Thus, in *Royal Indemnity Co. v. U. S.*, this Court observed:

But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due.

Nevertheless, the Court followed the local law as indicating a rule satisfactory for federal adoption, and ended by

applying the 6% rate provided by the New York law as to interest, observing:

. We think that in the circumstances of this case a suitable rate is that prevailing in the state where the obligation was given and to be performed.

Founded upon similar reasoning was the decision in *Board of Commissioners of Jackson County v. U. S.* where this Court noted:

With reference to other federal rights the state law has been observed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy.

The trial court in this case having, with the Second Circuit's affirmation, accepted the local law and the local rate as suitable, the result should not be disturbed in the absence of definite conflict with a clearly enunciated policy of Congress. Defendant assumes to find in the language of Section 16 (b) of the Fair Labor Standards Act an expression of "Congressional intention to exclude interest" in employees' suits under the statute (Pet. Br. p. 15), and thus fancies a conflict in which the state rule must fail. But the mere absence of reference to interest in Section 16 (b) is indicative of no Congressional intention to legislate its exclusion. The displacement of local statutory law will not be founded on mere inference. The principle was recently reiterated in *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 85:

Its (Congressional) purpose to displace the local law must be definitely expressed. *Mintz v. Baldwin*, 289 U. S. 346, 350, 77 L. ed. 1245, 1249, 53 S. Ct. 611. The rule applicable is clearly stated in *Illinois C. R. Co. v. State Pub. Utilities Commission*, 245 U. S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C, 279: "In construing federal statutes enacted under the power conferred by the commerce

clause of the Constitution \* \* \* it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

See also *Savage v. Jones*, 225 U. S. 501, 533.

The principle is further underlined by the exact language of the Conformity Act, which indicates that the state rule is to apply except where the Constitution or federal statutes may "otherwise require or provide." 28 U. S. C. § 725. The positive character of the words "*require*" and "*provide*" would seem to preclude the founding of an exception upon mere inference, or omission of mention. To argue from the absence of mention that Congress intended to fill up the field is to set up a principle in conflict with fundamental federal policy in all cases in the federal courts, no matter what the question involved, contrary to the fair intendment of the Conformity Act. Compare *Erie Railroad v. Tomkins*, 304 U. S. 64. The need for conforming state and federal law as applied to a particular problem in all cases arising within the territorial limits of the same state is the more pressing where there is involved a right of maintaining suit "in any court of competent jurisdiction," both state and federal. See 29 F. S. C. § 216 (b).\*

Further, petitioner has conceded, "Congress did not seek to control the amount of fees and costs, but knowing

\* If inferences are to be drawn from the language of Section 16 (b) of the Fair Labor Standards Act, it is perhaps significant that Congress, after providing for the recovery of unpaid minimum wages or overtime together with an additional equal amount as liquidated damages, added: "Action to recover such liability may be *maintained* in any court of competent jurisdiction \* \* \*". It was thus contemplated that both federal and state courts would have concurrent jurisdiction of employees' suits and if such actions were to be "maintained" in the state courts, obviously a mere detail of local law which "only incidentally affects the remedy for enforcing that responsibility" [*M. K. & T. R. R. Co. v. Harris*, 234 U. S. 412, 421] established by the federal statute was to remain fully effective, for the benefit of those by whom the action might be "maintained" in the state court. Such an incidental detail is the matter of interest. Compare Poole, "Private Litigation Under the Wage and Hour Act," 14 Miss. L. J. 157, 159-161.

these are matters of procedure which state courts having concurrent jurisdiction could wholly deny, Congress protected employees by specifically requiring such allowances" (Pet. Br. p. 15). But, if this be true, the omission to mention interest would appear to indicate an even stronger Congressional intention to leave the matter entirely to disposition according to state law.

Petitioners' argument that the Fair Labor Standards Act establishes a uniform and exclusive measure of recovery which precludes an award of interest under the state law (Pet. Br. p. 8 ff.) is founded upon various dicta in *Campbell v. Zavelo*, 243 Ala. 361, 366, 10 So. (2d) 29; *Murmann v. N. Y., N. H. & H. R. R. Co.*, 258 N. Y. 447; *Louisiana & Arkansas R. R. Co. v. Pratt*, 142 F. (2d) 847. (Pet. Br. pp. 9, 15-18), all of which are likewise distinguishable.\* Decisions of this Court indicate a con-

\* (1) The holding in *Campbell v. Zavelo* was the purest dictum. The court there reversed a judgment for defendant upon the merits and remanded for further proceedings; there was thus no question of interest passed upon by the lower court before the appellate court. Furthermore, the appellate court stated that "the amount sought is not within our statute and decisions providing for interest on failure of payment of contract price." Accordingly, the state law could not apply in any event.

(2) In *Murmann v. N. Y., N. H. & H. R. R. Co.*, a widow sued under the Federal Employers Liability Act to recover damages for the death of her husband. The case involved consideration not of Section 480 of the New York Civil Practice Act, which is limited to contract cases, but of Section 132 of the Decedent Estate Law of New York. Referring to the latter provision, which permitted interest in a suit for wrongful death of decedent, the New York Court of Appeals noted that the suit had been brought not under Sections 130 and 131 of the Decedent Estate Law, which the interest provision was designed to implement, but under the Federal Employers Liability Act; and the court concluded: "Section 132 of the Decedent Estate Law does not extend to cases brought under the federal statute. The Legislature (of New York State) had no intention to make it reach so far."

(3) *La. & Ark. Ry. Co. v. Pratt* contains conflicting and inconstant rationale. Nor can the decision be reconciled with the statement in the opinion that: "State and federal courts exercise concurrent jurisdiction over causes arising under the Federal Employers' Liability Act; interest is essentially a question of local law; and, for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied whenever it is practicable to do so" [142 F. (2d) 847, 850; and compare discussion under the first point of the argument above]. The answer lies in the words of Mr. Justice HOLMES in *Dickenson v. Stilés*, 246 U. S. 631, 633: "Coming to the merits, cases that declare that the acts of Congress supersede all state legislation on the subject of the liability of railroad companies to their employees have nothing to do with the matter. The Minnesota statute does not meddle with that \* \* \*. It (Congress) contemplated suits in state courts and accepted state procedure in advance \* \* \* we see no reason why it should be supposed to have excluded ordinary incidents of state procedure."

trary result. In *Massachusetts Benefit Assn. v. Miles*, 137 U. S. 689, it was urged that the provision for interest from judgment date in the federal statute (Rev. Stat. § 966) precluded recovery of interest prior to judgment although allowable under state law. Despite this objection, the Court held:

Section 966, while providing only for interest upon judgments, does not exclude the idea of power in the several states to allow interest upon verdicts, and where such allowance is expressly made by a state statute, we consider it a right given to a successful plaintiff, of which he ought not to be deprived. . . . The courts of the state and the federal courts sitting within the State should be in harmony upon this point.

Compare *Sioux County v. National Surety Co.*, 276 U. S. 238, 243.

Indicating a similar result is *Missouri K. & T. Railway Co. v. Harris*, 234 U. S. 412, 421, where a state law permitting recovery of a reasonable attorney's fee by a successful litigant in suits of various enumerated types, including claim for loss or damage to freight in transit, was held not inconsistent with a provision of federal statute establishing a right of action for goods lost or damaged while in interstate transit but making no mention of attorney's fees and costs. As was there noted:

. . . it has been held in a series of recent cases, that the special regulations and policies of particular states upon the subject of the carrier's liability for lost or damaged interstate shipments, and the contracts of carriers with respect thereto, have been superseded (by the federal law).

But the Texas statute now under consideration does not in any wise either enlarge or limit the responsibility for the loss of property intrusted to it in transportation, and only incidentally affects the



remedy for enforcing that responsibility. . . . it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney. . . . In fact and effect, it merely authorizes a moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep; among which are incidentally included claims for freight lost or damaged in interstate commerce.

And the Court concluded, distinguishing *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, that the mere omission of the federal statute regulating interstate commerce to authorize allowance of counsel fee was no indication "that it is not permissible for a state, as a part of its local procedure, to permit the allowance of a reasonable attorney's fee, under proper restrictions"; on the contrary, the "local statute, as already pointed out, does not at all affect the ground of recovery or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken". (234 U. S. 412, 421-422).

Similarly it has been held that in a shipper's action against a carrier in a federal court to recover reparation for excessive freight charges under Section 16 of the Interstate Commerce Act, interest as provided for by state law may be properly added to the amount of the award. This result was reached notwithstanding the absence from Section 16 of any provision for interest. *Louisville & N. R. R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 240; compare 49 U. S. C. § 16. To like effect is *Ferguson v. Union National Bank*, 126 F. (2d) 753, 759 (C. C. A. 4, 1942) where recovery of interest was allowed in conformity with state law in suit by a bank against the National Housing Administrator, although the statutory provision from which the right of suit was derived made no mention of interest. Compare 12 U. S. C. §§ 1702-1703.

Nor is it objectionable that Congress provided for

"liquidated damages" and that, if the state law as to interest is to be applied, an additional item of recovery will be added to the damages accorded by Congress (compare Pet. Br. pp. 13-16). The "liquidated damages" awarded under Section 16 (b) of the Act are but a part of wages, that is to say, a portion of the contract recovery itself. *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 583; *Northwestern Yeast Co. v. Broutin*, 133 F. (2d) 628 (C. C. A. 6, 1942). Under the circumstances, there can be no valid objection to an award of interest upon a sum which consists merely of a full measure of liquidated contract recovery.\* Further, computation of interest upon an aggregate sum recovered including liquidated damages is not a compounding; but even if it were, this Court has

\* In arguing that provision in Section 16 (b) of the Fair Labor Standards Act for "liquidated damages" was intended to preclude recovery of interest petitioners have ignored the essential distinction between damages and interest. Thus, liquidated damages merely restore to the underpaid workman equivalent wages taking into consideration the delay in payment; and the whole is "compensation" for "damages" which might otherwise be "too obscure and difficult of proof for estimate other than by liquidated damages" (*Overnight v. Missel*, 316 U. S. 581, 583). The need for timely payment of wages to the workingman or, upon failure of timely payment, for compensatory damages to insure restoration of his "real wage" position in view of constant change in the value of what his money can buy and in view of the hardship, even the want and privation, which delayed payment each week may occasion, has frequently been the subject of comment by both judges and economists. See *Morehead v. New York*, 298 U. S. 587, 635; Report of Committee on Wage Collection (1936), Bulletin No. 629, United States Department of Labor, Bureau of Labor Statistics, p. 139; Commons and Andrews, "Principles of Labor Legislation" (1936) p. 330.

Thus, it has been uniformly held that the rigid requirements of the Fair Labor Standards Act can be satisfied only by prompt payment of the overtime wages as currently earned in the regular course of employment or, in default thereof, by payment of back wages together with equivalent liquidated damages. *Seneca Coal & Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), cert. den. 320 U. S. 772 (1943); *Rigopoulos v. Keran*, 140 F. (2d) 506 (C. C. A. 2, 1943); *George Lawley & Son Corp. v. South*, 140 F. (2d) 439, 442 (C. C. A. 1, 1944); *Birbalas v. Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Culver v. Bell & Lofland*, 7 Wage Hour Rept. 1190, 8 Labor Cases (C. C. H.) par. 62,443 (C. C. A. 9, 1944); *Atlantic Co. v. Broughton*, 7 Wage Hour Rept. 1176, 8 Labor Cases (C. C. H.) par. 62,435 (C. C. A. 5, 1944).

Interest on the other hand is compensation for use by another of a specific sum of money, in this case a fully liquidated amount including both unpaid wages and statutory "liquidated damages." Further, it reflects the local legislature's determination as to the loan or use value of money in a particular locale, a matter best left to state law. Compare the purpose of provision for attorney's fees and costs in Section 16 (b), "so that employees will not suffer the burden of an expensive lawsuit" (83 Cong. Rec. 9264, cited in Pet. Br. p. 10).

indicated that the result is not invalid nor one which the courts need strain to avoid. See *Royal Indemnity Co. v. U. S.*, 313 U. S. 289, 295; *L. & N. R. R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 240.

Finally, petitioners have urged that to permit the federal court to follow state law and add interest to the damages provided for in Section 16 (b) is to create a lack of uniformity which is best avoided by disallowing interest entirely (Pet. Br. p. 17). But the fact is that "it is apparent, from a survey of the decisions, that the trend is toward conformity even where it is not obligatory. This result entails little sacrifice on the score of uniformity in the light of the tendency of the states to prescribe substantially similar rates of interest." See 44 Harvard Law Review 105, 108 (1930).<sup>\*</sup> In any event "whatever lack of uniformity this (result) may produce between federal courts in different states is attributable to our federal system", and "it is not for the federal courts to thwart . . . local policies" upon that ground. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U. S. 496. Such differences "are inevitable, as being peculiar to the forum." *M. K. & T. R. R. Co. v. Harris*, 234 U. S. 412, 421.

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<sup>\*</sup> The rates allowed in the various states "range from 5% to 8%" but "a preponderant majority of the statutes award 6% . . . the next most favored rate is 7% . . . less frequently the legal rate is 8% . . . a few statutes prescribe 5%." See 44 Harvard Law Review 105, 108-109, where all of the statutory interest provisions of the various states have been collated.

**CONCLUSION.**

In view of the sentiment of this Court that nothing is "more appropriate than due regard for local institutions and local interests"\* the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed in full.

Respectfully submitted,

AARON BENENSON,  
*Counsel for Respondent.*

*Of Counsel:*

JAMES L. GOLDWATER,  
HARRY RODWIN.

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\* *Jackson County v. U. S.*, 308 U. S. 343, 351.

## Appendix.

Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. Secs. 201 et seq.):

### *Section 16 (b)*

Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid over-time compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

### New York Civil Practice Act

#### *Section 480*

Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded.







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**In the Supreme Court of the United States**

**OCTOBER TERM, 1944**

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**No. 421**

**ARSENAL BUILDING CORPORATION AND SPEAR & Co.,  
INC., PETITIONERS**

**v.**

**MEYER GREENBERG**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

**No. 462**

**J. F. FITZGERALD CONSTRUCTION COMPANY,  
PETITIONER**

**v.**

**CHRIS PEDERSEN ET AL.**

---

**ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF  
APPEALS**

---

**BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES DEPART-  
MENT OF LABOR, AS AMICUS CURIAE**

The Solicitor General submits this brief on be-  
half of the Administrator of the Wage and Hour

Division, United States Department of Labor, as *amicus curiae*.

OPINIONS BELOW

No. 421

The opinion of the District Court for the Southern District of New York (R. 464-472), holding plaintiff entitled to judgment, is reported in 50 F. Supp. 700. The memorandum opinion of the District Court (R. 461), adding interest upon plaintiff's motion to amend the judgment, is not officially reported, but is printed in 7 Wage Hour Rept. 144 and in 8 Lab. Cases 62,071. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 479-482), affirming the District Court, is not officially reported but is printed in 7 Wage Hour Rept. 788 and in 8 Lab. Cases 62,287.

No. 462

The opinion of the Supreme Court of New York, Rensselaer Special Term (R. 42-47), granting plaintiff's motion for summary judgment, and the order of the Supreme Court (R. 41), granting plaintiff statutory recovery with interest, are unreported. The per curiam opinion of the Appellate Division, Third Department, of the Supreme Court of New York (R. 51), affirming the Special Term, together with the dissenting opinion (R. 51-58), is reported at 266 App. Div. 1032. The opinion of the New York Court of Appeals (R. 63-65), affirming the Appellate Division, is reported at 293 N. Y. 126.

### JURISDICTION

The judgment of the Second Circuit Court of Appeals in case No. 421 was entered on August 10, 1944 (R. 482). The petition for writ of certiorari was filed September 1, 1944, and was granted, on November 6, 1944, limited to question (h).

The judgment of the New York Court of Appeals in case No. 462 was entered on June 19, 1944 (R. 63). The petition for certiorari was filed on September 13, 1944, and was granted on November 6, 1944.

The jurisdiction of this Court in case No. 421 rests on Section 240 (a) and in case No. 462 on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Sections 347 (a) and 344 (b), respectively).

### QUESTION PRESENTED

The question considered in this brief is whether interest may be added to the statutory recovery under Section 16 (b) of the Fair Labor Standards Act.

### STATUTE INVOLVED

The pertinent provision of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Sec. 201) is the following:

SEC. 16 (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of

their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. the court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

In allowing interest, the courts below relied on Section 480 of the New York Civil Practice Act which provides:

*Interest to be included in recovery.* Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money



shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded.

#### STATEMENT

Both suits were instituted by employees under Section 16 (b) of the Fair Labor Standards Act to recover unpaid overtime compensation and liquidated damages, as provided by the Act. In granting recovery of both of the amounts sued for, the courts allowed averaged interest on those amounts from the mid-point in the period of underpayments, pursuant to Section 480 of the New York Civil Practice Act which provides for the recovery of interest in any "action for the enforcement of or based upon breach of performance of a contract, express or implied."<sup>1</sup>

#### ARGUMENT

Both the New York Court of Appeals in the *Pedersen* case and the Circuit Court of Appeals in the *Arsenal* case upheld the inclusion of interest in a judgment rendered for statutory over-

<sup>1</sup> The legal rate of interest in New York is 6%. N. Y. Cons. Laws (Cahill, 1930) c. 21, § 370.

time and liquidated damages under Section 16 (b) of the Fair Labor Standards Act. The interest in both cases was computed from the date of the underpayment. Petitioner attacks these awards of interest on the ground that the propriety of including interest in a judgment rendered under Section 16 (b) raises "a federal question" to be determined by federal, not state law; that the federal policy expressed in the Fair Labor Standards Act precludes such an award of interest; and that therefore the application of the state law conflicts with the federal statutory policy. (Petition for certiorari in *Pedersen* case, pp. 17-19; petition for certiorari in *Arsenal* case, p. 38.) The Government agrees that the question whether interest should be awarded is a federal question to be determined by federal law. We submit, however, that, under the federal law, and under the policy expressed in the Fair Labor Standards Act, judgments for overtime compensation under Section 16 (b) of the Act should include an award of interest from the date of underpayment. We further submit that neither the provisions of the Act, nor its underlying policy, preclude the inclusion of an award of interest on the "equal amount" recoverable as "liquidated damages" in a suit for overtime compensation under Section 16 (b)..

THE ALLOWANCE OF INTEREST ON THE CLAIMS HERE INVOLVED IS A FEDERAL QUESTION, AND THE COURT MAY DETERMINE A SUITABLE RATE OF INTEREST TO BE ALLOWED ON SUCH CLAIMS

1. This Court has consistently recognized that "in the interpretation and application of federal statutes, federal not local law applies" (*Prudence Corp. v. Geist*, 316 U. S. 89, 95), and that where a claim is derived from a federal statute, "the state court was bound to proceed in such manner that all substantial rights of the parties under controlling federal law would apply." *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 245, 246. See also *McKenzie v. Irving Trust Co.*, No. 188, Oct. Term, 1944, decided Jan. 8, 1945, page 4 of slipsheet opinion; *Clearfield Trust Co. v. United States*, 318 U. S. 363; and cases cited in the Government's brief *amicus curiae* in Nos. 445 and 554, *Brooklyn Savings Bank v. William J. O'Neil and Dize v. Maddrix*, pp. 8-9. Since the claims asserted here are clearly derived from a federal statute—Section 16 (b) of the Fair Labor Standards Act, which permits suits to recover unpaid overtime compensation and an "additional equal amount as liquidated damages" in "any court of competent jurisdiction"—and since there is nothing in the Fair Labor Standard Act war-

granting an interpretation of Section 16 (b) as adopting rules of state law (cf. *Davies Warehouse Co. v. Bowles*, 324 U. S. 144), the claims which the respondents sought to enforce in the courts below are clearly governed by federal law.

The Fair Labor Standards Act is silent on the awarding of interest on the obligation created by Section 16 (b). But since the obligation is itself created by a federal statute, the allowance of interest thereon is in "the absence of an applicable federal statute [a question] for the federal courts to determine, according to their own criteria \* \* \*." *Royal Indemnity Co. v. United States*, 313 U. S. 289, 296; see also *Board of Commissioners v. United States*, 308 U. S. 343, 350, 352; Note (1930), 44 Harv. L. Rev. 105.

And while the "liability for interest is of relatively recent origin and the rationale of its recognition or denial is not always clear" (*Board of Commissioners v. United States*, 308 U. S. 343, 351); it is well settled that, under the federal law, "if there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account." *Young v. Godbe*, 15 Wall. 562, 565. See also *Royal Indemnity Co. v. United States*, *supra*; *Casey v. Galli*, 94 U. S. 673; *Garvy v. Wilder*, 121 F. (2d) 714 (C. C. A. 7).

Since it has been finally determined in these cases that respondents are entitled to liquidated

amounts which had been improperly withheld from them, interest in some amount should be awarded on those amounts unless it can be demonstrated that such an award would conflict with the federal or state policy. Cf. *Board of Commissioners v. United States*, 308 U. S. 343.

2. The courts below awarded interest on respondents' claims at the rate of 6%, computed from the date of underpayment. The 6% rate was adopted by these courts, as an appropriate one, from the New York Civil Practice Act. We submit that the rate allowed was proper.

In the *Royal Indemnity* case, *supra*, the majority of this Court was of the view that while a state law would not be regarded as "controlling" in determining the rate of interest to be awarded by a federal court in entering judgment on a claim which derived from a federal statute, "a suitable rate is that prevailing in the state where the obligation was given and to be performed" (313 U. S. at 297). Three Justices declined, however, to accept this view because "interest rates fixed by state legislatures are not uniform but vary in amount," and suggested the fixing of a uniform rate by the federal judiciary.

Examination of the state statutes fixing the rates of interest reveals that a 6% rate has been



adopted in thirty-nine states,<sup>3</sup> a 5% rate in four states,<sup>4</sup> a 7% rate in four states,<sup>5</sup> and an 8% rate in but one state.<sup>6</sup> A 6% rate of interest is also

<sup>3</sup> Ala. General Acts (1935), No. 37, p. 69; Ariz. Code (Rev. Supp., 1936) § 1883; Ark. Digest Stat. (Pope, 1927) § 9391; Colo. Sess. Laws (1935) c. 139, § 1; Conn. Gen. Stat. (1930) § 4729; Del. Rev. Code (1935) § 3101; Idaho Code Ann. (Supp. 1940) § 26-1904; Ind. Ann. Stat. (Burns, 1933) § 19-2001; Kan. Gen. Stat. (Corrick, 1935) § 41-101; Ky. Rev. Stat. (Baldwin, 1942) § 360.010; Me. Rev. Stat. (1930) c. 57, § 142; Md. Ann. Code (Flack, 1939) art. 49, § 1; Mass. Gen. Laws (1932) c. 107, § 3, c. 235, § 8; Minn. Stat. (Mason, 1927) § 7036; Miss. Ann. Code (Harrison, 1942) § 36; Mo. Rev. Stat. (1939) § 3226; Mont. Rev. Code Ann. (Anderson and McFarland, 1935) § 7725; Neb. Comp. Stat. (Supp., 1941) § 45-102; N. H. Rev. Laws (1942) c. 367, § 1; N. J. Rev. Stat. (1937) § 31:1-1; N. M. Stat. Ann. (1941) § 53-603; N. Y. Cons. Laws (Cahill, 1930) c. 21, § 370; N. C. Code Ann. (Michie, 1939) § 2305; N. D. Comp. Laws Ann. (Supp. 1925) § 6072; Ohio Code Ann. (Throckmorton, 1940) § 8305; Okla. Stat. (1941) tit. 15, § 266; Ore. Comp. Laws Ann. (1940) § 66-101; Pa. Stat. (Purdon, 1936) tit. 41, § 3; R. I. Gen. Laws (1938) c. 485, § 1; S. C. Civil Code (1942) § 6736; S. D. Code (1939) § 38.0108; Tenn. Code Ann. (Williams, 1934) §§ 7301, 7302; Tex. Ann. Stat. (Vernon, 1926) arts. 5069, 5070; Utah Code Ann. (1943) tit. 44-0-1; Vt. Pub. Laws (1933) § 7130; Va. Code Ann. (1936) § 5551; Wash. Rev. Stat. Ann. (Remington, 1932) § 7299; W. Va. Code Ann. (Michie, 1943) § 4627; Wis. Stat. (1943) § 115.04.

<sup>4</sup> Ill. Rev. Stat. (Smith-Hurd, 1941) c. 74, § 1; Iowa Code (1939) § 9404; La. Code of Practice (Dart, 1942) Art. 554; Mich. Comp. Laws (1929) § 9239.

<sup>5</sup> Cal. Gen. Laws (Deering, 1944) Act 3757, § 1; Ga. Code (1933) § 57-101; Nev. Comp. Laws (Hillyer, 1929) § 4322; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 58-102.

<sup>6</sup> Fla. Stat. (1941) § 687.01.

prescribed in a number of federal statutes.' Congress has also provided that interest shall be allowed on the judgments of federal district courts at the rate permissible under the law of the state.\*

These statutes, we submit, manifest a general consensus of both state and federal legislative opinion that 6% is the proper rate of interest on a liquidated sum improperly withheld, and that the federal policy in this respect is substantially the same as that of the states. Since the question as to the proper rate of interest is legislative in nature this Court might well be guided by these expressions of legislative opinion in determining the rate of interest as a matter of federal law. In any event, however, the result would be the same in the instant cases whether the Court approves a

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<sup>7</sup> 40 U. S. C. 258a; 370 (included in the amount of final award in federal land condemnation proceedings); 31 U. S. C. 227 (on money improperly set-off by the United States against judgments secured against it); 31 U. S. C. 505 (on moneys recoverable by the United States in suits by it against government officers who have improperly withheld government funds); 26 U. S. C. 3771 (a) (on overpayment of internal revenue taxes); 26 U. S. C. 3794 (on delinquent internal revenue taxes).

\* See 28 U. S. C. 811 which provides that with respect to judgments secured in federal district courts, interest "shall be allowed \* \* \* in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State", and such interest "shall be calculated \* \* \* at such rate as is allowed by law on judgments recovered in the courts of such State."

federal rate of 6% or holds that allowance of the state rate of 6% was not improper:

## II

### INTEREST ON THE STATUTORY LIABILITY UNDER SECTION 16 (B) WAS PROPERLY AWARDED BY THE COURTS BELOW

The courts below awarded the respondents interest under Section 16 (b) of the Act on (1) unpaid overtime compensation and (2) on an "additional equal amount as liquidated damages."

While we think it clear, that the award of interest under Section 16 (b) on unpaid minimum wages or unpaid overtime compensation finds support in the intendment of the Act and in the interpretation given to it by this Court, the award of interest on the additional equal amount recoverable as liquidated damages does not involve all of the same considerations. We shall, therefore, treat separately the propriety of the award of interest on these two items of statutory liability.

#### A. INTEREST ON "UNPAID MINIMUM WAGES" AND "UNPAID OVERTIME COMPENSATION" UNDER SECTION (B)

Petitioners contend that "the Fair Labor Standards Act \* \* \*, properly construed, \* \* \* precludes an award [of interest]" (*Pedersen* pet., p. 17; *Arsenal* pet., p. 38). Although petitioner in the *Arsenal* case concedes (*Br.*, pp. 12-13), as the authorities require (see p. 8, *supra*), that or-

dinarily interest would be allowable on a claim for unpaid wages, it is argued that the provision for liquidated damages "as the remedy for all injury, including the injury of delay," when considered in the light of the specific provision for costs and attorney's fees and the omission of any mention of interest in the statute, indicates Congressional intent that no interest should be awarded (*Pederson* pet., p. 17, *Arsenal* pet., p. 38).

The answers to this argument are: (1) the liquidated damages cannot include or take the place of ordinary interest since they cannot accomplish the recognized purposes of such interest and are intended as compensation only for the indefinite and *unmeasurable* expenses, resulting from failure to pay statutory wages when due, which are not compensated by ordinary interest; and (2) the accrual of interest, unlike costs and attorney's fees, is implicit in the recovery of any debt for a liquidated amount past due and owing, and consequently the failure to provide specifically for interest is not indicative of Congressional intent that none should accrue.

1. A simple answer to petitioners' claim that liquidated damages are, in part, a substitute for interest is that, being fixed in amount regardless of the length of the delay in the payment of wages,

\* The "damage" for which ordinary interest accrues is simply the accepted measure of the difference between the present and future value of money. See *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U. S. 485, 489. And see note 10 on page 15, *infra*.

the liquidated damages cannot possibly accomplish the recognized purposes of ordinary interest—to translate past amounts due into present money value and to induce prompt payment of debts. The absence of the time factor in the provision for liquidated damages is persuasive evidence that Congress did not intend liquidated damages to serve as a substitute for or to be exclusive of the accrual of usual interest. To hold that the Act precludes an award of interest is to impute to Congress an intent to impede the recovery of the statutory wages by removing the ordinary incentives which tend to induce prompt payment of money claims generally. If interest were not allowed to accrue on the statutory liability, "there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation." See *Casey v. Galli*, 94 U. S. 673, 677. There is nothing in the nature of the statutory liability under the Fair Labor Standards Act, nor is there any other reasonable ground, to warrant the assumption that Congress intended to eliminate this motive to pay promptly which ordinarily attaches to liquidated monetary claims.

In contrast to the purposes of the standardized allowance of interest, the purpose of the liquidated damages is to compensate employees for the unascertainable expenses and losses which are likely to result when a worker fails to receive his statutory wages on time. As recognized by this



Court in *Overnight Motor Co. v. Missel*, 316 U. S. 572, holding that the liquidated damages under the Fair Labor Standards Act "are compensation, not a penalty or punishment by the Government" (p. 583), they are compensation for the indefinite and *unmeasurable* expenses and losses which might be incurred by the employee as a result of his failure to receive the statutory wages when due (*ibid.*). This Court stated (*ibid.*):

The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.

"Damages too obscure and difficult of proof for estimate" are obviously the unmeasurable damages attendant upon the detention of statutory wages—damages peculiar to the wage earners whom this legislation was designed to protect. The difference between the present and future value of money,<sup>10</sup> in compensation for which ordinary interest is usually allowed on any liquidated claim due and owing, is not obscure nor unmeasurable;

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<sup>10</sup> See Slichter, *Modern Economic Society* (1931 ed), p. 679: "When a man borrows \$1,000 for one year at 6 per cent, at the end of the year he pays the lender \$1,060. This may seem improvident, because the borrower is giving \$1,060 for \$1,000. The reason why it is not necessarily improvident is because the borrower receives the \$1,000 *now* and pays the \$1,060 *a year hence*. In other words, interest represents the premium which men are willing to pay for present purchasing power." See also Knight, *Interest* in 8 *Encyclopedia of Social Sciences* (1931 ed) pp. 134-135; Clay, *Economics for the General Reader* (1926 ed.) pp. 323-324.

on the contrary it is a standardized and easily ascertainable amount. The purpose of Section 16 (b) was not to substitute liquidated damages for such ordinary and standardized allowances but to make the employee whole for the indefinite, unstandardized and unascertainable damages likely to result from delays in the payment of the statutory wages. For example, the employee whose wages are detained may be unable to have an illness treated and thereby subsequently incur great expense and loss of time at work or conceivably even sustain a grave injury to his health; or he may be unable to meet an insurance payment and be forced to allow his policy to lapse; or he may be driven to pledge more than ordinary prices for necessities in order to secure them on credit. Needless to say, these and other possible effects of the employee's failure to receive his statutory wage when due are hardly possible to predict; and it is for these indefinite damages, which cannot be estimated, that Congress deemed it necessary to provide fixed compensation in the form of liquidated damages.<sup>11</sup>

<sup>11</sup> See *Cox v. Lykes Bros.*, 237 N. Y. 376, 379, 143 N. E. 226, where Chief Judge Cardozo stated with respect to a substantially identical provision, giving seamen whose wages are wrongfully withheld a sum equal to two days' pay for each and every day for which payment shall be delayed: "How much this extra amount should be would be often a troublesome question if it were left open in every case. "Hence it might be deemed advisable to have this *indefinite element* made definite by a general law with reference to

2. Nor is the fact that attorney's fee and costs are expressly mentioned in Section 16 (b), while interest is not, indicative of Congressional intent that no interest should accrue. The dissimilarity between interest on the one hand, and attorney's fee and costs on the other, is obvious; as noted in the preceding discussion, interest is implicit in the translation of a liquidated amount due in the past into present terms and would customarily accrue as a matter of law without special legislative provision. Attorney's fees and costs, however, are expenses of the litigation, which would ordinarily not be recoverable, and the payment of which was clearly designed to encourage the enforcement of their rights by employees who might otherwise be reluctant to institute proceedings. As pointed out by Representative Keller on the floor of the House (Cong. Rec.; Vol. 83, Part 8, p. 9264):

Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in ad-

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which the parties may conclusively be presumed to have contracted, and which, therefore, should be taken to be the law of the contract. (Emphasis supplied.)

dition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. [Emphasis supplied.]

In accordance with these principles, interest has been allowed under a substantially similar provision in Section 16 (2) of the Interstate Commerce Act which specifically provides for costs and attorney's fees but not for interest. *City of Danville v. Chesapeake & Ohio Ry. Co.*, 34 F. Supp. 620 (W. D. Va.). The cases cited by petitioners in which interest has been disallowed under the Federal Employers Liability Act or the Jones Act (*Arsenal Br.*, pp. 16-17) are not in point, since the damages under those statutes were unliquidated and therefore outside the general rule allowing interest on liquidated claims. See *Casey v. Galli*, *supra*, p. 677.<sup>12</sup>

<sup>12</sup> "Generally, interest is not allowed upon unliquidated damages." *Miller v. Robertson*, 266 U. S. 243, 258; see also *Mouery v. Whitney*, 14 Wall. 620, 653. This rule is well illustrated in the case of *Duplate Corp. v. Triplex Co.*, 298 U. S. 448; relied on by petitioner (*Arsenal Br.*, p. 15), where this Court stated (at p. 459):

we think that interest should run from the date when the damages are liquidated, and not \* \* \* from the date of the last [patent] infringement.

In *Blair v. Sioux City & P. Ry.*, 73 N. W. 1053 (Iowa, 1898), also relied on by petitioner (*Arsenal Br.*, p. 15), the court based its decision, disallowing interest on treble damages resulting from unlawful rate discriminations by common

Clearly, therefore, the courts below did not err in awarding respondents interest on the statutory recovery for unpaid overtime compensation.<sup>13</sup>

carriers, on the ground that the "statute is penal in character" (at p. 1058).

Petitioners rely also on the cases of *Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875 (S. D. N. Y.) and *Campbell v. Zavelo*, 243 Ala. 361, 366, 10 S. (2d) 29, refusing to allow interest on the statutory liability under the Fair Labor Standards Act (*Pedersen* pet., p. 19). The *Berry* case, which was decided before the decision of the Second Circuit in the *Arsenal* case, was apparently based on the assumption that interest is included in the liquidated damages provided by the statute—an assumption which, as we have shown *supra*, is unsound. The rationale of the Alabama Supreme Court in the *Zavelo* case is not entirely clear: its decision appears to be based on the fact that "the provisions of the Act of Congress are the limits of liability which can be imposed on an employer" and also on the fact that interest on this type of liability was apparently not allowable under the state law. See also *Wilks v. Phillips & Buttorff Mfg. Co.*, 7 Wage Hour Rept. 972 (C. A. Tenn., 1944) refusing to allow interest on the basis of the state law. But see, in addition to the cases at bar, the following cases allowing interest on statutory liability under the Fair Labor Standards Act: *Rigopoulos v. Kervan*, 140 F. (2d) 506 (C. C. A. 2); *Campbell v. Mandel Auto Parts Corp.*, 6 Wage Hour Rept. 435 (Sup. Ct. N. Y., 1943).

<sup>13</sup> Petitioners in the *Arsenal* case assert that the Administrator "has never considered interest on wages withheld or on the additional equal amount of liquidated damages as a part of the employees' right of recovery for violations" (Br., p. 10). In support of this assertion, petitioners cite a number of statements by the Administrator that employers violating the Act are liable for double the unpaid sum, plus court costs and reasonable attorneys' fees, and the fact that, in collecting back wages, the Administrator has not required the payment of interest. The statements are virtually verbatim quotations of the language of Section 16 (b) without any



B. INTEREST ON "LIQUIDATED DAMAGES" UNDER  
SECTION 16 (b)

For the reasons indicated (*supra* point II-A), the payment of interest on unpaid minimum wages and overtime compensation is not only in accord with the general rule that interest accrues on liquidated amounts due and owing, but also seems necessary to effectuate the primary objective of the Fair Labor Standards Act—the full and prompt payment of the minimum wage and overtime compensation required by Sections 6 and 7. Although an award of interest on the liquidated damages provided by Section 16 (b) also would tend to secure greater promptness in payment, it is not as essential to the achievement of the basic policy of the Act, since the liquidated damages plus interest on the primary amount would appear fully to reimburse the employee for the delay in payment of the primary amount due.

consideration of the special question of interest. Although the Administrator does collect the unpaid back wages required by Sections 6 and 7 of the Act, where possible, his primary concern in collecting such restitution has been to effectuate the basic objective of the Act, the payment of the amounts due under Sections 6 and 7, and to offset the competitive advantage which the violating employer may have derived from past underpayments. He has not purported, and has no responsibility, to collect the full amount of the liability imposed upon the employer by Section 16 (b). Neither the statements referred to nor his practice of collecting the unpaid compensation without interest reflects any administrative policy with respect to the accrual of interest upon employees' claims.

Nevertheless it is questionable whether Congress intended the employer to be able to delay the payment of liquidated damages as long as he desired without added liability for interest until the amount was reduced to judgment.<sup>14</sup> Since the liquidated damages constitute a sum certain, their nature is such as to bring them within the orthodox rule that interest accrues on liquidated claims. We think it reasonably clear that the Act does not forbid such payment.

Respectfully submitted,

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<sup>14</sup>It is true that interest would continue to run on the overtime compensation, whether or not it would also run on liquidated damages; but this circumstance could be taken care of by the employer's paying overtime compensation alone, and leaving the liquidated damages claim for later disposition.